
(1920) 08 CAL CK 0035

Calcutta High Court

Case No: None

Barendra Nath Mitter

APPELLANT

Vs

Martin and Co. and
Others

RESPONDENT

Date of Decision: Aug. 13, 1920

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 54(1), 64, 73

Citation: AIR 1921 Cal 801 : 62 Ind. Cas. 167

Hon'ble Judges: Asutosh Mookerjee, Acting C.J.; Ernest Fletcher, J

Bench: Division Bench

Judgement

Mookerjee, Actg., C.J.

This is an appeal from the judgment of Mr. Justice Buck-land on an application for the distribution of the surplus sale-proceeds in a mortgage suit. The facts material for the determination of the questions raised before us are not in dispute and may be briefly recited.

2. On the 14th May 1909 Mallik executed in favour of the Mitters a mortgage of Immovable property situated partly within and partly beyond the local limits of the ordinary original civil jurisdiction of this Court On the 1st September 1910 the Mitters instituted a suit to enforce their security, The preliminary decree was made on the 28th April 1911 and was followed by the final decree on the 12th July 1912. The sale was held in due course, on the 23rd November 1918. When the amount due on the mortgage in suit had been ascertained on the 27th August 1919, it was found that a considerable surplus would be left after satisfaction of the claim of the mortgagees. Meanwhile, after the preliminary decree but before the final decree in the mortgage suit had been made, Martin & Co. on the 2nd June 1911 obtained a decree against Mallik for a sum of Rs. 80,289 5 9, and on the 25th August 1911 attached the mortgaged properties in execution of their money decree.

3. Some time afterwards, during the pendency of the mortgage suit, after the final decree therein but before the sale in execution, Mallik, on the 21st April 1914, executed another mortgage in favour of one of the Mitters. The mortgagee instituted a suit on the 1st November 1915 to enforce this security. The preliminary decree was made on the 4th February 1916, and was followed by the final decree on the 4th July 1917.

4. There were other creditors of Mallik who held decrees for money against him and applied for execution, as set out in the following statements

Name of Creditor.	Date of decree.	Date of application for execution and attachment
Manmatha Nath Mallik ...	21st August 1911	14th July 1914
Srinath Pal ...	1st May 1911	14th August 1914
Duni Chand ... Gorakhpur	26th May 1917	31st August 1917
Bank ...	10th July 1916	18th December 1916

5. The question in controversy relates to the relative rights in the surplus sale proceeds of Martin & Co., Barendra Nath Mitter (the mortgagee of 1914), Manmatha Nath Mallik, Srinath Pal, Duni Chand and the Gorakhpnr Bank. Mr, Justice Buckland has held that" Martin & Co. are entitled to be paid before Barendra Nath Mitter who, in his opinion, is entitled to payment before the creditors who attached subsequent to the sale in the suit of the first mortgagee, that is, before the Gorakhpur Bank, but after Manmatha Nath Mallik, Srinath Pal and Duni Chand. We have been invited in the present appeal, which has been preferred by Barendra Nath Mitter to examine the legality of this order. The relative rights of the claimants must depend primarily upon the true construction of Sections 64 and ,73 of the Civil Procedure Code, 1908.

6. Section 73 provides as follows:

(1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons:

Provided as follows:

(a)...

(b)...

(c) where any Immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied

first, in defraying the expenses of the sale;

secondly, in discharging the amount due under the decree;

thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any); and,

fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

7. It is plain that to entitle a creditor to rateable distribution, he must have made an application to the Court, which holds the assets, before the receipt of such assets for the execution of an unsatisfied decree for the payment of money passed against the same judgment-debtor. In the case before us, it is plain that Martin & Co., Manmatha Nath Mallik, Srinath Pal, Duni Chand and the Gorakhpur Bank had all applied for execution, each in respect of his own decree, before the receipt of assets by the Court. Matilal Ray, the purchaser of one of the properties, paid the balance of the purchase money into Court, only on the 3rd January 1919. It was held under the Code of 1882, in the case of Ramanathan Chettier v. Subramania Sastrial 26 M. 179, that where property is sold in execution of a decree in separate parcels, the sale-proceeds are not deemed to be realised until the entire amount of purchase-money in respect of all the parcels is paid into Court. The substitution of the words "before the receipt of such assets" for the words "prior to the realisation" has clearly left the law unaltered in this respect. Consequently, from the point of view of the date of application for execution in relation to the date of the receipt of assets, it follows that all the creditors, Martin & Co., Manmatha Nath Mallik, Srinath Pal, Duni Chand and the Gorakhpur Bank, must be placed in the same category and are entitled to rank together.

8. The question next arises, whether Barendra Nath Mitter, who took the mortgage of the 21st April 1914, is entitled to priority over any, and, if any, which of the money decree-holders just mentioned. He claims priority over all of them, and relies upon Clause (c) of the proviso to Sub-section (1) of Section 73. The argument in substance is that he comes under the third category mentioned in Clause (c) and consequently takes precedence over all persons included in the fourth category, which, according to him, comprises the five money decree-holders just mentioned. We are of opinion that, this argument is fallacious. The categories included in Clause (c) are no doubt arranged in

order of priority, but the third category is obviously intended to refer to such subsequent encumbrancers alone as are entitled to take precedence over the money decree-holders mentioned in the fourth category. The Legislature could never have intended to include amongst the encumbrances enumerated in the third category such encumbrances, for instance, as may have been created by the judgment-debtor during the pendency of an attachment by a money decree-holder. If the contrary intention were imputed to the Legislature, the result would follow that a dishonest judgment-debtor might nullify the salutary provisions of Section 64 by the creation of encumbrances after an attachment had been effected by a money decree holder, and might, by recourse to this device, take away, through the bands of such encumbrancers, fund which would otherwise be legitimately available for the satisfaction of the claim of the unsecured creditors decree holders. The essence of the matter is that when a subsequent encumbrancer invokes the aid of the third category of Clause (c) and Claims the benefit of the priority conferred thereby, the Court is bound to satisfy itself that he is in law entitled to precedence over the holders of decrees for the payment of money mentioned in the fourth category. There is thus no escape from the conclusion that Barendra Nath Mitter cannot gain an advantage by appeal to Clause (c) of Sub-section (1) of Section 73, unless he establishes that he is a subsequent encumbrancer entitled to priority over the holders of the decree for money already mentioned. This leads us on to an examination of the provisions of Section 64.

9. Section 64 is in the following terms:

Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation--For the purpose of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

10. In the case before us, as we have already stated, Martin & Co. attached the mortgaged property, that is, the equity of redemption, on the 25th August 1911. Thereafter, on the 21st April 1914, the mortgagor executed the mortgage in favour of Barendra Nath Mitter. This encumbrance was in essence a mortgage of the equity of redemption which had already been attached by Martin & Co. Under Order XXI, Rule 54(1), the attachment was made by an order prohibiting the judgment-debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge. It was immaterial that the property was the equity of redemption, because as pointed out in *Parashram Harlal v. Govind Ganesh* 21 B. 226 : 11 Ind. Dec. (N.S.) 153, the equity of redemption of a mortgagor is Immovable property within the meaning of this prohibitory provision of the law. The mortgage executed in favour of Barendra Nath Mitter, in contravention of this provision of the law, forthwith attracted the operation of Section 64, namely, the mortgage became void as against all

claims enforceable under the attachment. It has been argued, however, on behalf of the mortgagee that Section 64 ceased to operate as soon as the sale was held under the decree obtained by the first mortgagee. But neither authority nor principle support this construction, which attributes to Section 64 an operation restricted in point of time. Doubtless, the prior mortgagee was in no way bound or affected either by the attachment or the subsequent encumbrance created pendent lite; *Faiyaz Busain Khan v. Munthi Prag Narain* 34 I.A. 102 : 29 A. 339 : 6 C.L.J. 563 : 9 Bom. L.R. 656 : 11 C.W.N. 661 : 4 A.L.J. 344 : 17 M.L.J. 263 : 2 M.L.T. 191 : 10 O.C. 314 (P.C.); *Lake Nath Sahu v. Achutananda Dass* 2 Ind. Cas. 85 : 16 C.L.J. 891; the purchaser who acquired the property at the sale was not prejudiced thereby, for such a sale conveyed the interests of the mortgagor and mortgagee as they were at the date of the first mortgage, and, therefore, necessarily swept away the subsequent encumbrance. But it cannot be overlooked that the subsequent mortgagee claims the surplus sale-proceeds on the basis of his position as mortgagee, and the attaching creditor also founds his claim on the attachment effected by him. Consequently, when this conflict of claims arises, we are bound to give effect to the provision of Section 64 and treat the encumbrance void as against all claims enforceable under the attachment. The provisions of Section 64 would be completely superseded, if we were to give effect to the contention of the second mortgagee that "not only has his mortgage ceased to be void as against all claims enforceable under the attachment, but that he has become actually entitled to priority over the attaching creditor, We hold accordingly that Barendra Nath Mitter is not entitled, as against Martin & Co., to be placed in the third category of Clause (e) of the proviso to Sub-section (1) of Section 73, Civil Procedure Code.

11. The question next arises, whether the other decree-holders, namely, Manmatha Nath Mallik, Srinath Pal, Duni Chand and the Gorakhpur Bank, are entitled to rank with Martin & Co. for the purpose of precedence over Barendra Nath Mitter We have already pointed out that the distinction made by Mr. Justice Buckland between creditors who had attached at the date of sale and creditors who attached subsequently, cannot be sustained. The material point of time is, not the date of sale (which in this case was the 23rd November 1918), but the date of receipt of assets by the Court (which was, as we have seen, the 3rd January 1919). Consequently, the four attaching creditors just mentioned stand in the same class for this purpose, as each of them had applied for execution of his decree before the receipt of assets by the Court. It is plain that, amongst themselves, no question of priority arises on the basis of the successive attachments, for as laid down in *Soobul Chunder Law v. Russick Lall Mitter* 15 C. 202 : 12 Ind. Jur. 307 : 7 Ind. Dec (N.S.) 719; *Frederick v. Madan Gopal* 29 C. 428 : 6 C.W.N. 577 *Thakurdas Moti Lal v. Joseph Iskender* 41 Ind. Cas. 516 : 44 C. 1072 : 25 C.L.J. 595 : 21 C.W.N. 887 and *Suikeena Katum v. Mahomed Abdul Aziz* 29 Ind. Cas. 239 : 38 M. 221 where a fund in Court has been attached by several creditors of the judgment-debtor, none of the attaching creditors is entitled to preferential treatment by reason of the priority of his attachment, The question then reduces to this, whether the four creditors who applied for execution between the 14th July 1916 and the 18th December 1918, take rank with Martin & Co.

who applied for execution and effected an attachment on the 25th August 1911, and thus squeeze out, as it were, Barendra Nath Mitter who took bin mortgage in the interval, on the 21st April 1914. The solution of this question depends upon the true construction of the explanation to Section 64, which provides that, for the purposes of the section, claims enforceable under an attachment include claims for the rateable distribution of assets. The four execution : creditors contend that, as if there had been no mortgage to Barendra Nath Mitter, they would be entitled now, u/s 73, to rateable distribution along with Martin & Co., the mortgage of Barendra Nath Mitter should be deemed void, not only as against the claim of Martin & Co., but also as against their own claims for rateable distribution of assets, which, they maintain, are in essence enforceable under the attachment of Martin & Co. We are of opinion that this contention is fallacious. The private transfer or delivery of the attached property is, no doubt, rendered, by virtue of Section 64, void as against all claims enforceable under the attachment, inclusive of claims for the rateable distribution of assets. But, plainly, the claims for rateable distribution of assets, like the primary claim enforceable under the attachment, must be in actual existence when the private transfer or delivery of the attached property is made, in other words, the claims for rateable distribution of assets must have actually arisen, by reason of the fulfilment of the fundamental requirement of Section 73, namely, an application to the Court for the execution of a decree for the payment of money. The expression "claims enforceable under the attachment," taken apart from the explanation, unquestionably refers to a claim in existence as such on the date of the alienation. The explanation, no doubt, enlarges the scope of the words by the inclusion of claims for the rateable distribution of assets, but clearly such claims must possess the same quality as the claim primarily enforceable under the attachment, that is, actual existence at the time of alienation. In our opinion, it would be unreasonable to hold that claims of the latter description include claims that might by possibility arise in the future. If we do not adopt such a construction, the consequence will follow, for all practical purposes, that once a property is attached, it can never be alienated, even though the attaching creditor does not object, nay gives his consent to the transfer, Assume that an alienation is made with the consent of the attaching creditor, and some time after, other money-decrees are obtained against the same judgment-debtor, possibly upon transactions subsequent in date, It is difficult to see on what principle these subsequent decree-holders should be allowed to contend that the allocations, made long before their decree, possibly long before their transactions, were void as against them. If we look at the matter from a slightly different point of view, the transferee is bound by the condition of things as they exist at the time of the transfer and is not prejudiced by events subsequent. Reference has been made, in the course of argument, to the decision in *Sorabi Eduli Warden v. Govind Ramji* 16 B. 91 : 8 Ind. Dec. (N.S.) 537; *Khushalchand v. Nandram Sahebram* 12 Ind. Cas. 672 : 35 B. 516 : 13 Bom L.R. 977; *Jetha Bhima Sf Co. v. Lady Janbai* 17 Ind. Cas. 625 : 37 B. 138 : 14 Bom. L.R. 904; *Durga. Churn Rai Chowdhry v. Monmohini Dasi* 15 C. 771 : 7 Ind. Dec. (N.S.) 1098; *Manohar Das v. Ram Autar Pande* 25 A. 431 : A.W.N. (1903) 92 and *Annamalai Chettiar v. Palamahi Pillai* 41 Ind. Cas. 539 : 41 M. 265 : 22 M.L.T. 461 : 33 M.L.J. 707 : (1917) M.W.N. 882 : 7 L.W. 298. The majority of these cases were decided under the Code of

1882; and as the Code of 1908 has substantially altered the law on this point, it would not be safe to embark upon a meticulous examination, by way of comparison and contrast, of all the relevant sections of the Codes of 1882 and 1903 with a view to determine the true meaning and effect of the new provision, But there is considerable force in the contention that the legislature have, by insertion of the explanation in Section 64, indicated their preference for some at any rate of the opinions expressed by Telang, J., in *Sorabji Edulji Warden v. Govind Ramji* 16 B. 91 : 8 Ind. Dec. (N.S.) 537 as against the view taken by Piggott, J., in *Durga Churn Roy Chowdhry v. Monmohini Dasi* 15 C. 771 : 7 Ind. Dec. (N.S.) 1098 and by Edge, C.J., in *Delhi and London Bank Limited v. Ram Narain* 9 A. 497 : A.W.N. 107 : 5 Ind. Dec. (N.S.) 769 which were followed in *Manohar Das v. Ram Autar Pande* 25 A. 431 : (1903) A.W.N. 92, as authority for the proposition that the claim of a person who applies for a rateable distribution of assets is not a claim enforceable under the attachment placed upon the property at the instance of another judgment-creditor. It is not necessary, however, to hold that the alteration in the law made by the Legislature is a legislative affirmance of all the propositions enunciated in *Sorabji Edulji Warden v. Govind Ramji* 16 B. 91 : 8 Ind. Dec. (N.S.) 537 as appears to have been held in some of the judgments in *Annamalai Chettiar v. Palamalai Pillai* 41 Ind. Cas. 539 : 41 M. 265 : 22 M.L.T. 461 : 33 M.L.J. 707 : (1917) M.W.N. 882 : 7 L.W. 298. The case last mentioned is an authority for the proposition that where a decree-holder attached land in execution of his decree and other decree-holders applied for rateable distribution without attaching the land in execution of their decrees, and subsequently the judgment-debtor alienated the land and paid off the attaching decree-holder, the other decree-holders were not entitled to question the alienation u/s 64 of the Civil Procedure Code, 1908. For the purposes of the case before us, it is not necessary to affirm this proposition with its necessary implications in their entirety. It is sufficient to hold that the claim for rateable distribution cannot be recognised as a claim u/s 64 unless it is in actual existence at the time of the alienation, and it cannot ripen into such a claim, unless the necessary conditions formulated in Section 73 have been fulfilled. One of such conditions undoubtedly is the presentation of an application for execution of a decree for the payment of money before the receipt of assets; and we need not pause to consider, whether the claim could be deemed a claim in existence, before the receipt of assets, even after the presentation of the application for execution. The view we take is supported by the decision of the Judicial Committee in *Mina Kumari Bibi v. Bijoy Singh Budhuria* 40 Ind. Cas. 242 : 41 I.A. 72 : 44 C. 682 : 25 C.L.J. 508 : 21 M.L.T. 344 : 1 P.L.W. 425 : 5 L.W. 711 : 32 M.L.J. 425 : 21 C.W.N. 585 : 15 A.L.J. 382 : 19 Bom. L.R. 424 : (1917) M.W.N. 473 (P.C). In that case a decree-holder held two decrees against the same person and attached certain properties in execution of one of his decrees, and would have been entitled to rateable distribution if the attachment had resulted in a sale. Pending attachment, the judgment-debtor sold the property. The attachment subsequently ceased to be operative and the decree-holder then attached the property and brought it to sale, The purchaser sought to recover the property from the alienees from the judgment debtor, A decree was passed in his favour by the High Court, but it was reversed on appeal by the Judicial Committee, on the ground that the sale in execution, being under an attachment

subsequent to the private alienation, was not protected by Section 276, Dealing with the argument that Section 276 rendered the alienation void as against the subsequent attachment, Sir Lawrence Jenkins observed :

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. Exhypothesi, 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.

12. It was also urged before the Judicial Committee that, having regard to the decision of the Bombay High Court in *Sorabji Edulji Warden v. Govind Ramji* 16 B. 91 : 8 Ind. Dec. (N.S.) 537, the decree-holder was a person who would have been entitled to rateable distribution and was consequently protected against the private alienation. The Judicial Committee disposed of the argument with the following observations *Mina Kumari Bibi v. Bejoy Singh Dudhuria* 40 Ind. Cas. 242 : 41 I.A. 72 : 44 C. 682 : 25 C.L.J. 508 : 21 M.L.T. 344 : 1 P.L.W. 425 : 5 L.W. 711 : 32 M.L.J. 425 : 21 C.W.N. 585 : 15 A.L.J. 382 : 19 Bom. L.R. 424 : (1917) M.W.N. 473 (P.C):

He relies on Section 295 of the CPC 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 Edulji Warden v. Govind Ramji* 16 B. 91 : 8 Ind. Dec. (N.S.) 537 is correct, and that the conditions of Section 295 have been satisfied, it cannot advance the decree-holder's case.

13. It may be added that a private transfer, contrary to an attachment, is, u/s 64, not absolutely void, but void only as against claims enforceable under the attachment; *Anund Loll Doss v. Jullodhur Shaw* 14 M.I.A. 543 : 10 B.L.R. 134 : 17 W.R. 313 : 2 Suth. P.C.J. 659 : 3 P.C.J. 81 : 20 E.R. 888; *Umesh Chunder Roy v. Raj Bullubh Sen* 8 C. 279 : 10 C.L.R. 204 : 4 Ind. Dec. (N.S.) 178; *Abdul Rashid v. Gappo Lal* 20 A. 421 : A.W.N. (1898) 98 : 9 Ind. Dec (N.S.) 620. The result of the view we take is that the question of the extent to which the validity of the alienation can be impeached, must be answered with reference to such claims enforceable under the attachment, inclusive of claims for the rateable distribution of assets, as are in existence on the date of alienation. The persons

entitled to rateable distribution become, in other words, fixed, like the attaching creditor, at the moment the alienation takes place. The conclusions which follow from this interpretation of Sections 64 and 73 may now be summarised:

(1) Martin & Co. will be paid first from the available surplus assets.

(2) Barendra Nath Mitter will be paid from the balance, after the dues of Martin & Co. have been satisfied;

(3) the balance, if any, will be available for rateable distribution amongst Manmatha Nath Mallik, Srinath Pal, Duni Chand and the Gorakhpur Bank.

14. The result is that the appeal of Barendra Nath Mitter is dismissed with costs payable to Martin & Co. The appeal is allowed with costs as against the other respondents except the Gorakhpur Bank, as the position assigned to the Bank by the order of Mr. Justice Buckland has not been altered in effect by our decision. The order for costs made by Mr, Justice Buckland will stand as between Barendra Nath Mitter and Martin & Co., but will be set aside as between Barendra Nath Mitter and Satyendra Nath Pal, who will pay the costs of the former.

15. The costs allowed will be taxed as on a hearing.

Fletcher, J.

16. I agree.