

(1973) 04 BOM CK 0001
In the Bombay High Court
Case No : Appeal No. 1087 and 1965

Motilal Madanchand Lodha	Vs	APPELLANT
Ragho Tanaji Patil and Others		RESPONDENT

Date of Decision : 26-04-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 64

Citation : AIR 1974 Bom 261 : (1974) 76 BOMLR 207 : (1974) MhLj 404

Hon'ble Judges : Malvankar, J;Aggarwal, J

Bench : Division Bench

Advocate : K.S. Bhadtj, for B.R. Baik, for the Appellant; M.R. Kotwal, for M.A. Rane and V.S. Kotwal, for the Respondent

Judgement

Mallvankar, J.—This is an appeal against the judgment and decree passed by the Assistant Judge, Dhulia, on 7th May 1965 in Civil Appeal No. 294 of 1963, allowing the appeal and decreeing the suit being Regular Civil Suit No. 275 of 1962 which was dismissed by the trial Court with costs. The appeal arise this way.

2. The present appellant is original defendant No. 1 and respondent Bos. 2 and 3 are original defendants Nos. 2. and 3, Respondent No. 1 is the original plaintiff, Defendant No.1 had obtained a money decree against defendant Nos. 2 and 3 in Regular Civil Suit No. 312 of 1950. The property in dispute which is a plot of land originally belonged to one Balabai wife of Ishram. In the year 1947 defendant No. 2 had purchased this plot from Balabai . On 20th February 1955, defendant No. 2 sold the plot to the plaintiff for Rs. 500 under a registered, Ex. 45. After the purchase, the plaintiff also constructed a cattle shed on it. Since then the plaintiff was in possession and enjoyment of the plot along with an adjacent plot with which we are not concerned in this appeal. Defendant No. 1, after he obtained the money decree, had filed Regular Darkhast No. 630 of 1959 against defendants No. 2 and 3 and had also prayed for the recovery of the amount under the decree by attachment and sale of the plot of land in dispute. On 18th July 1960 the order of attachment came to be passed and later on the

attachment. In April 1961, when the suit plot was put up for sale, he came to know about this attachment and filed Miscellaneous Application No. 53 of 1961 for raising the attachment. The Court, however, did not adjourn the sale, with the result that the plot came to be sold by auction on 29th April 1961 and was purchased by defendant No. 1 decree holder. In due course, he also obtained a sale certificate on 25th July 1962. The plaintiff also alleged that in attaching the suit plot and bringing it to sale, defendant No. 1 had perpetrated fraud on the Court. The miscellaneous application filed by the plaintiff ultimately came to be dismissed on 5th October 1961. The plaintiff, therefore, filed this suit for a declaration that the suit plot bearing Gram Panchayat No. 499 with the structure standing thereon situate in the village of Mehergaon in Dhulia Taluka of the same was not liable to be attached and sold in execution of the decree obtained by defendant No. 1 against defendants Nos. 2 and 3, and that the auction sale was void. He also prayed for permanent injunction restraining defendant No. 1 from taking possession of the plot.

3. The suit was contested by defendant No. 1 on several grounds. One of the grounds was that the sale-deed obtained by the plaintiff from defendant No. 2 was bogus, sham, colourable, fictitious and without consideration, and the same was executed to defeat his claim. He also denied that the plaintiff was ever in possession of this plot of land or had constructed any building thereon. He contended that the possession of the plot continued with defendants Nos. 2 and 3. He further contended that he had filed Regular Darkhast No. 511 of 1954 in January 1955 and in that Darkhast he had got the suit plot attached on 18th January 1955. He had also obtained an injunction against defendants Nos. 2 and 3 restraining them from entering into any transaction of sale of the suit plot privately. According to him, therefore, the sale being effected by defendant No. 2 in favour of the plaintiff while the attachment in Regular Darkhast No. 511 of 1954 was subsisting, the same was void. He also claimed for compensatory costs. Defendants Nos. 2 and 3 were proceeded against ex parte.

4. The learned trial Judge found that the sale deed dated 20th February 1955 executed by defendant No. 2 in favour of the plaintiff was bogus, sham, colourable and fictitious document executed with a view to defeat the claim of defendant No. 1 against defendants Nos. 2 and 3, and that the sale-deed was without consideration. He, therefore, came to the conclusion that the plaintiff did not acquire any title under the sale-deed. The learned Judge also found that the sale-deed was void on the ground that it was executed while the attachment on the suit plot was subsisting on the date of the sale-deed, in the execution proceedings being Regular Darkhast No. 511 of 1954. The plaintiff then went in appeal to the District Court, and the learned Assistant Judge who heard the appeal came to the conclusion that though the suit plot was attached in Regular Darkhast No. 511 of 1954 and on the date of the sale-deed viz. 20th February 1955 the attachment was subsisting, still the same came to an end later on when the same Darkhast came to be disposed of on 4th July 1956. He was, therefore, of the view that the attachment having come to an end, it could not render the

transaction of sale void, though on the date of the sale-deed the attachment was subsisting. According to him, therefore, the sale in favour of the plaintiff being perfectly valid, defendant No. 1 could not acquire any title at the auction sale. As regards the contention of defendant No. 1 that the sale was bogus, sham, colourable, fictitious and without consideration, he found against defendant No. 1. Being aggrieved by this judgment and decree, defendant No. 1 has come to this Court in second appeal.

5. The only important point that falls for determination in this appeal is whether the sale dated 20th February 1955 evidenced by the sale-deed, Ex. 45, is void being hit by Section 64, C.P.C. For the purposes of confederating this question, a few facts which are not in dispute are these. Defendant No. 1 had obtained a money decree against defendants Nos. 2 and 3 in Regular Civil Suit No. 312 of 1950. In execution of this decree, he filed Regular Darkhast No. 511 of 1954. In this Darkhast, the plot of land in dispute was attached on 18th January 1955 as partly satisfied. It is material to note here that while disposing of the Darkhast ultimately came to be disposed of on the 4th July 1956 as partly satisfied. It is material to note here that while disposing of the Darkhast the Court did not direct the attachment to continue. Thereafter, defendant No.1 filed second Darkhast being Regular Darkhast No. 171 of 1958 on 28th March 1958, but the same was also disposed of on 24th July 1959. It is common ground that in this Darkhast no fresh attachment was levied on the suit plot on land in dispute. Thereafter, defendant No. 1 filed third Darkhast being Darkhast No. 630 of 1959 on 29th December 1959. In this Darkhast, fresh attachment was levied on the suit plot on 18th July 1960. In due course, the plot of land was put up for sale and was purchased by defendant No. 1 himself on 29th April 1961. While the first Darkhast was pending and attachment of the plot of land in dispute was subsisting, on 20th February 1955 the plaintiff purchased this plot from sale-deed, Ex. 45. A few days before the execution of this sale-deed, on 17th January 1955 defendant No. 1 had applied for injunction against defendant land privately. This injunction was served both on defendants Nos. 2 and 3 on 18th January 1955. On 25th June 1961 after the suit plot came to be purchased by defendant No. 1 the plaintiff applied under Order 21 Rule 58 C.P.C. for raising the attachment, but the application was dismissed on 5th October 1961. He, therefore, filed the present suit on 4th September 1962.

6. In view of these facts, the question that arises for determination is whether the sale effected by defendant No.2 in favour of the plaintiff on 20th February 1955 under Ex. 45 is void in view of the provisions of S. 64 C.P.C. The learned Counsel Mr. Bhadti appearing that when the first attachment was subsisting on 20th February 1955, the date of the sale-deed, defendant No. 1 had an enforceable claim and, therefore, as against him the sale becomes void in view of the provisions of Section 64 C.P.C. The learned Counsel Mr. Kotwal, appearing on behalf of respondent No.1, on the other hand, has argued that the first Darkhast No. 511 of 1954 in which the suit plot was attached on 18th January suit plot was attached on 18th January 1955, having been disposed of on 4th July 1956,

and there being admittedly no direction of the Court to continue the attachment the attachment ceased and, therefore, there could be no claim enforceable under that attachment. According to him, therefore Section 64 C.P.W. would not assist defendant No. 1 in such a case. Secondly, he had argued that defendant No. 1 having levied attachment afresh in Regular Darkhast No. 630 of 1959 which came to be filed on 29th December 1959 long after the sale-deed was executed on 20th February 1955, and in pursuance of this attachment the suit plot being brought to sale and purchased by defendant No. 1 obviously his claim could be said to be enforceable only under the second attachment. Now s. 64 C.P.C. reads thus:

"Where an attachment has been made any private transfer or delivery of the property attachment 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 purposes of this section, claims enforceable under an attachment include claims for the ratable distribution of assets."

It is material to note that Section 64 C.P.C. therefore contemplates only one attachment and no other. Once an attachment is made, if there is any transfer or delivery of attachment property contrary to such attachment, such a transfer would be void as against all claims enforceable under that attachment. The word "attachment" occurs thrice in this provision. Where it occurs first, it is "an attachment". where it comes for the second time it is "such attachment" and where we read it for the third time, it is "the attachment". Obviously, therefore, the attachment, during the subsistence of which the transfer is effected or delivery of property is made must be the same attachment under which all claims of the attaching creditor are enforceable. If, therefore, at the time of enforcement of the claim the attachment under which the claim is enforced is different from any earlier attachment then obviously the attaching creditor cannot take advantage of the earlier attachment, particularly when such an attachment has already ceased to exist for one reason or the other. In the instant case, therefore, as we have already pointed out the first attachment came to an end on 4th July 1956 when the first Darkhast was disposed of. It was precisely for this reason or the other. In the instant case, therefore as we have already pointed out the first attachment came to an end on 4th July 1956 when the first Darkhast was disposed of. It was precisely for this reason that defendant No. 1 had to this reason that defendant in Regular Darkhast No. 630 of 1959 when the first Darkhast was disposed of. It was precisely for this reason that defendant No. 1 had to this reason that defendant No. 1 had to levy fresh attachment in Regular Darkhast No. 630 of 1959 which was filed on 29th December 1959, without there being any attachment levied on the suit plot. Not only this, but defendant No. 1 enforced his claim by bringing the suit plot to sale and purchased it himself in pursuance of the subsequent attachment and not the first attachment. That being so, on the reading of Section 64 C.P.C. itself, we are

inclined to take the view that the first attachment which came to an end on 4th July 1956 cannot be availed of by defendant No. 1 even though during the subsistence of that attachment the plaintiff purchased the suit plot from defendant No.2 on 20th February 1955. We are fortified in this view by several decisions of different High Courts. However, we are not pointed out any decision of our High Court bearing on the point. Before we deal with several decisions of while to refer to a decision of our High Court to which our attention is drawn by the learned Counsel for the appellant.

7. This decision is reported in AIR 1928 545 (Bom.) . In this case, the question involved was an to the validity of the sale-deed dated 8th June 1920 in favour of the plaintiffs. The property covered by the sale-deed originally belonged to one Bhabhutsingh. On 8th April 1920. One Bhila, brother of the defendant, brought suit No. 261 of 1926 and attached before judgment the property in suit on 23rd. April 1920. On 19th April 1920. the plaintiffs brought a suit No. 287 of 1920 and attached the property before judgment on 28th May 1920. On before judgment on 28th May 1920. On 22nd April 1920, the defendant brought suit No. 294 of 1920 and got the property attached before judgment on 19th June 1920. The sale-deed in favour of the plaintiffs for Rs. 8,000/- was passed for satisfaction of the claim in their, own suit and the claim of the defendant's brother in suit No. 261 of 1920. Those claims were satisfied and suit no. 287 of 1920 brought by the plaintiffs was dismissed for want of prosecution on 15th June 1920, and the suit of the defendant's brother was similarly dismissed on 22nd June 1920. The defendant, however, obtained a decree, and in execution of his decree he purchased the property on 1st July 1921. The contest was, therefore, between the defendant as an auction-purchaser in execution of his own decree and the plaintiffs as purchasers under the private sale from the original owner on 8th June 1920. It was urged in that case that the sale-deed in favour of the plaintiffs was void u/s 64. C.P.C. as it was effected on 8th June 1920 at a time when there were two attachments before judgment in suit No. 261 of 1920 of the defendant's brother and suit No. 287 of 1920 of the plaintiffs and that the defendant himself attached the property on 19th June 1920. The question, therefore, arose whether the private transfer in favour of the plaintiffs was contrary to the attachment within the meaning of Section 64 C.P.C. It was urged on behalf of the defendant-appellant in that case that though the private transfer in favour of the plaintiffs was prior to his attachment on 19th June 1920, he could take advantage of the existing attachments before judgment in the defendant's brother's suit and in the plaintiff's suit which were subsisting at the data of the sale in favour of the plaintiffs. This Court, however, held that inasmuch as the claims of the plaintiffs and the defendant's brother were satisfied format he consideration for the sale-deed in favour of the plaintiffs, and the plaintiffs suit was dismissed on 15th June 1920 and the defendant's brother's suit was dismissed on 22nd June 1920 it could not be said that the plaintiffs sale-deed was contrary to the two attachments which might be said to be technically subsisting on the date of the sale-deed. It was then argued that

the sale-deed in favour of the plaintiffs was void against all claims enforceable under an attachment, and that the claim in the defendants suit was a claim enforceable under the attachments before judgments in the two suits which were subsisting at the date of the sale. This Court, however held that in that case at the date of the sale in favour of the plaintiffs on 8th June 1920, there was no decree and no sale in execution of a decree. The attachment referred to in Section 64, C.P.C. was the attachment under which the execution sale was held and not an attachment of a creditor who was paid off. This court, therefore, held that there being no claims enforceable under the previous attachments u/s 64, C.P. and the claim of the defendant not being one coming under the Explanation to Section 64, the claim of the defendant was not a claim enforceable under the attachment within the meaning of section 64, C.P.C. it is no doubt true that the facts in this case were little different. However, this court observed that "an attachment referred to in Section 64. C.P.C. is the attachment under which the execution sale is held is paid off". It is true that in that case there were different attaching creditors and none attaching creditor was claiming benefit under the attachment levied by another attaching creditor in view of the provisions of Section 64. C.P.C. But at that the attachment referred to in Section 64. C.P.C. is the attachment under which the execution sale is held and not off. However, as we have already indicated, apart from t the aforesaid observations, it is possible to distinguish the present case from the facts of the case cited above.

8. We may also refer in this connection to two decision of the Madras High Court. The first is reported in B. Nana Rao Vs. M.U. Arunachalam Chettiar and Others, , which is a Full Bench decision. The Madras High Court has held that Section 64. C.P.C. provides that where property has been attached, any subsequent alienation is void against all attachment, but it does not go beyond this. An attachment effected after a private alienation is not assisted by an attachment before the the alienation. If the execution proceedings in which the second attachment has been made, have been instituted before assets have been brought into Court, the creditor will be entitled to rateable distribution if the property is sold in the earlier execution proceedings, but if the sale takes place as the result of the attachment effected after the private alienation, a person who buys the property at the Court auction will not obtain a good title and the alienation would not be void as against his titled. It is not necessary to refer to all the facts of the case because in this much as the attachment on which reliance was placed in support of the attack on mortgage had been made under a different decree from that in execution of which the auction-purchaser had purchased the property. Nevertheless, the Madras High Court has observed in the case that Section 64. C.P.C. provides that where property has been attached, any subsequent alienation is void against all claims enforceable under that particular attachment, but it does not go beyond this. An attachment effected after a private alienation is not assisted by an attachment before the alienation. Similarly, in Swarupchand Rayanji and Others Vs. Majeti Janakiramayya and Others, , the same High Court has observed at page 332 that all that Section 64.

C.P.C. provides is that any private transfer by the judgment-debtor of the property attached shall be void as against all claims enforceable under the attachment. it will not be accurate to read Section 64 as putting an end to the power of sale, because as between the transferor and the transferee, the alienation will undoubtedly be operative . If the attaching creditor is paid off or for any reason the attachment ceases to subsist, the alien's title will be unassailable. On facts, however, this case also is distinguishable.

9. Coming to another set of cases relied upon by the learned Counsel Mr. Kotwal, the first is Gobind singh v. Zalim Singh ILR (1884) 6 All 33. the facts of this case were similar to those of the present case. On Bachu Lal held a decree for money against one Behari singh and sold the decree to one Kauleshar. Kauleshar put this decree in execution in 1865. The property, the subject of the suit, was attached in execution of this decree on 20th February 1866, and on 20th June 1867 the property was advertised for public sale. On 17th June 1867, while the attachment was subsisting the judgment-debtor Behari Singh executed three conditional sale-deeds in respect of the attached property conveying (1) one-third thereof to Shankardial Singh, (2) another third to Durga Singh and Dulli, ancestors of the plaintiffs, and (3) the remaining third to the ancestors of the defendants. Possession was given to the vendees under these three deeds. In 1867 Kauleshar's application for execution was struck off pending the execution file. In February 1868. Kauleshar made a fresh application for execution and the property attached in 1866-67 was again attached on 14th May 1868. On 18th September 1875, another application for execution was made, the property conveyed to Durga Singh and Dulli by sale-deed No. 2 being attached and the property conveyed by sale-deed No. 1 to Shankardial singh being exempted on the allegation that he had made some payment towards satisfaction of the decree. the case was struck off. In 1876 the judgment debtor's sons Nand Kishore and Deonarain Singh brought a suit against the conditional vendees under sale-deed No. 3 the ancestors of the defendants in the suit, to set aside the sale made to them on the ground that it was made ultra vires by their father and whilst he was of unsound mind. This suit was dismissed by the Court of first instance on 21st June 1876, and that decree became final as no appeal was preferred therefrom. In 1878, Kauleshar resumed proceedings in execution of his decree and moved the Court to sell one-half of the two-thirds bought by the vendees under the sale-deed Nos. 1 and 3 the other moiety being exempted from sale. This application like the others, was struck off on 15th October 1879. finally, in 1880 Kauleshar executed his decree and brought to public sale the property conditionally sold in 1867 to the ancestors of the defendants in the suit (sale-deed No. 3). The plaintiffs in the suit, the descendants of Durga Singh and Dulli (sale-deed No. 2) bought the property and brought the suit against the defendants, the vendees under the deed No. 3, to set aside that deed, and to recover possession from them, claiming on the ground, among others, that the alienation of the property was made while it was under attachment, and it was therefore void u/s 240 of Act VIII of 1859 and Section 276 of Act X of 1877. The

Court of first instance held in respect of this ground of claim that the attachment of 1866-67 did not affect the validity of the alienation to the defendants as such attachment had been in operative, and it dismissed the suit. On appeal by the plaintiffs, the lower appellate Court held that the alienation was void u/s 240 of Act VIII of 1859, having been made while the property was under attachment, and gave the plaintiffs a decree. The defendants appealed to the High Court contending that the attachment of 1866-67 did not affect the validity of the alienation to them. The High Court held that a private alienation of property under attachment was void u/s 276 of the CPC as against all claims enforceable under the attachment only. Therefore, where property attached in execution of a decree was alienated and was after such alienation again attached, the first attachment having expired, and was brought to sale in pursuance of the second attachment and the purchaser sued for possession of the property claiming on the ground that the alienation of the property was void under the provisions of Section 276, that as no claim was enforced or was enforceable under the first attachment under which the property was alienated, but the purchaser was claiming under the second attachment, such alienation could not be assailed under the provisions of Section 276. It may be noticed here that the provisions of Section 64 of the Civil Procedure Code, 1908 are similar to the provisions of section 276 of the Civil Procedure Code, 1877. It would thus be seen that this decision clearly helps respondent No. 1 plaintiff in this case. Likewise in *Nageshwar Tewari v. Rup Narain Shukul* (1926) 97 Ind Cas 547 which is also the decision of the Allahabad High Court and which only follows the aforesaid decision of the Division Bench, it is held that a transfer by a judgment-debtor of property attached in execution of a decree against him, after such attachment had ceased by virtue of Order 21 Rule 57. Civil Procedure Code, and before a re-attachment of the same, is not void u/s 64, Civil Procedure Code, against the claims of a purchaser of the properties in execution sale, inasmuch as the property is sold in pursuance of the second attachment and not the first. In that case also, the facts were almost similar to the facts of the present case. In that case *Tirjagi Narain Tewari* defendant No. 2 instituted a suit for possession of property against *Rup Narain shukul*, the plaintiff. The suit was dismissed and *Rup Narain Shukul* got a decree for costs. In execution of his decree he applied for the attachment of the property now in suit and the attachment of that property was ordered on 22nd September 1916. While that attachment was still subsisting. *Tirjagi Narain Tewari*, the owner of the property hypothecated it on 3rd June 1917 to *nageshar Tewari*, his uncle. defendant No. 1. The plaintiffs application for execution was struck off on 23rd February 1918 but the plaintiff made a fresh application for attachment on 10th September 1918, and the property was re-attached and was sold on 20th February 1920, and was purchased by the decree-holder himself. The plaintiff-decree-holder sued for a declaration that the mortgage executed by the judgment-debtor on 3rd June 1917 was not binding on him and id not affect the property which he purchased at the auction sale. The trail Court dismissed the plaintiffs suit but the lower appellate Court had decreed the claim on the finding that the mortgage which

was executed on 3rd June 1917, when the property was under the prior attachment, did not affect the property which was sold in pursuance of the subsequent attachment. The High Court however, held that the transfer was not affected by Section 64, Civil Procedure Code, inasmuch as the transfer was under prior attachment and the claims of the decree-holder were enforceable under the subsequent attachment in pursuance of which he himself had purchased the property at the auction sale.

10. The learned Counsel Mr. Kotwal has also invited our attention to a decision of the Patna High Court in Bhagwan Lal Vs. Rajendra Prasad Sahi and others . In that case, a mortgage which came to be challenged. However, later on that attachment ceased to exist and there was fresh attachment in another execution proceeding and the question arose whether the claim of the decree-holder could be said to be enforceable under the first attachment, and the Patna High court held that the attachment contemplated in Section 64. Civil Procedure Code, is that under which the claim is enforceable. It was also argued in within the meaning of Section 64, Civil Procedure Code, against the present claim because it was a claim which might have been enforced under the earlier attachment which came into operation before the mortgage. But this argument was repelled by the Patna High Court observing that if the claim ceased to be enforceable under an attachment relied upon as avoiding the alienation it seems obvious that there is no longer any claim enforceable and not one which might have been enforced under an attachment which has since come to an end. The Patna High Court, therefore, also appears to have taken the same view as that of the Allahabad High Court.

11. In this connection, we may also usefully refer to a decision of the Privy Council reported in Mina Kumari v. Bijoy Singh. AIR 1916 PC 238. In that case one A had obtained two decrees against the same judgment-debtor and had purchased the properties in Court sale by attachment and sale in execution of the second decree, while the attachment effected in execution of the prior decree was kept subsisting the execution dismissed with the decree-holders consent, and the judgment-debtor privately sold the properties to another creditor by sale-deeds dated the day previous to the second decree. Their Lordships of the Privy Council held that the private alienee's title must prevail because the private sale itself was a day previous to the attachment in pursuance of the decree which actually led put to the sale and that the effect of the earlier attachment in the prior decree was to entitle the decree-holder to the benefit of the later attachment and would not otherwise place him on a better position. The mere fact that the same person is the decree-holder in both the cases would not strengthen the position of the decree-holder purchaser. In arriving at this decision, their Lordships have also observed that though the word "attachment" occurs three times in Section 276 of the Civil Procedure Code, 1882, the reference is to one, and only one attachment; that one in this case was the later attachment under which the property was sold. 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 could rest. Similarly, in *M. Marathachalam Pillai v. Padmavathi Ammal* (1970) 2 SCWR 174. Their Lordships of the Supreme Court have observed that by Section 64 the attachment is void as against all claims enforceable under the attachment and it is not void generally. The mere existence of another attachment on the date of the private transfer and its later removal did not invalidate the private transfer. In that case, one G.H. Muhammad Yousuff Sait was the owner of a house at Octacamand. M Marathachalam Pillai obtained a money decree against Sait and attached the house belonging to Sait in execution of the decree on 7th August 1956. The house was then put up for sale and was purchased by Pillai with the leave of the Court on 7th February 1958. In obtaining possession of the house. Pillai was obstructed by Padmavathi who was respondent in the appeal before the Supreme Court, who claimed that she had purchased it for Rs. 15,000/- under a private sale from Sait on 9th October 1956. The executing Court ordered in a summary enquiry that the obstruction raised by Padmavathi be removed. Padmavathi then filed a suit in the Civil Court for setting aside the summary order. The trial Court dismissed the suit against Pillai holding that the house had been properly attached and the sale being contrary to the attachment levied by Pillai was void against all claims thereunder. In appeal, the High Court of Madras held that the attachment was not made according to law, since the requirements of Order 21, Rule 54, Civil Procedure Code, had not been complied with. The High Court reversed the decree, and decreed Padmavathi's suit. Pillai went in appeal to the Supreme Court on a certificate granted by the High Court. Their Lordships of the Supreme Court held that the attachment was bad in law and on that ground Padmavathi's suit was decreed. However, an alternative contention was advanced before their Lordships on behalf of the appellant. It was argued that at the time of sale in favour of Padmavathi there was another outstanding attachment and, therefore, the sale being contrary to such attachment was in any event void. It appeared that on 17th January 1956 Pillai had in execution of a decree obtained in suit No. 55 of 1953 attached the property but that attachment was removed on 23rd March 1957 on satisfaction of the decree. Their Lordships, therefore, observed that by Section 64, Civil Procedure Code, the attachment was only void as against all claims enforceable under the attachment and it was not void generally. Since the attachment effected on 17th January 1956 was removed any private alienation contrary to such attachment could not be regarded as void for there were no claims enforceable under the attachment dated 17th January 1956.

12. It would thus be seen that in the instant case, defendant No. 1 having purchased the plot of land in dispute in execution proceedings in which second attachment came to be levied, his claim could be said to be enforceable within the meaning of Section 64, Civil Procedure Code, under the attachment only and not under the first attachment, during the subsistence of which the plaintiff purchased the plot of land in dispute from defendant No. 2 and the attachment came to an end on account of the execution proceedings being disposed of.

13. The learned Counsel Mr. Bhadti, however, strongly relied upon a decision of the Calcutta High Court reported in Bhupendra Nath Kumar v. Joonus Haji Abdullah. (1935) 39 Cal 733. That was an application for the revision of an order dated 24th September 1934 made by the lower Court, dismissing a claim in execution proceedings under these circumstances. The predecessors of the petitioners had obtained a money decree against the opposite party No. 2 for about Rs. 600/-. The opposite part No. 1 obtained another money decree against the same judgment-debtor for about Rs. 3,000/-. The petitioners put their decree into execution in Execution Case No. 264 of 1930 and attached certain properties including those now in suit on 4th June 1930. The opposite party No. 1 put his decree into execution in Execution Case No. 228 of 1930 and attached the properties now in dispute on 18th September 1930. On 17th October 1930, the judgment-debtor opposite party No. 1 made a private transfer of the properties in favour of the petitioners for about Rs. 4,500/- and out of this money Rs. 3,400/- was paid to a mortgagee who had taken the mortgage long before the attachment. Rs. 600/- was credited to the petitioners decree and the balance was paid in cash. Then the petitioners brought Title Suit No. 40 of 1931 for a declaration that the decree obtained by the opposite party No. 1 was collusive and the attachment was a bogus one. The opposite party No. 2 was made a party to that suit. The suit was subsequently referred to arbitration and on 19th March 1934, a decree was made in terms of the award. The material terms of this award, so far we are concerned, are these:-

"The attachment effected at the instance of the opposite party No. 1 on 18th September 1930 in Execution Case No. 228 of 1930 was declared to be valid and effective and the petitioner's purchased on 17th October 1930 was subject to that attachment".

Subsequently it appeared that the opposite part No. 1 proceeded with the Execution Case No. 228 of 1930, but on 25th May 1934, he having taken no steps, it was dismissed for default. On the following day, however, he started a fresh execution case being Case No. 93 of 1934, and again attached the said property. Thereupon the petitioners filed a claim under Order 21, Rule 58, Civil Procedure Code, for a declaration that their position remained unaffected by the subsequent attachment. The learned Judge of the lower Court held that the Execution Case No. 228 of 1930 having been dismissed on 25th May 1934, the attachment ceased thereby. But he also held that, both according to the decree in terms of the award and according to decree in terms of the award and according to the provisions of section 64, Civil Procedure Code, the transfer made in favour of the petitioners on 17th October 1930 was void as against the decree-holder opposite party No. 1 and in that view he dismissed the petition. Against that judgment, the revision application was filed. it would thus be seen that in that case under the award attachment was declared to be valid and sale was made subject to the attachment. That being the position, the Calcutta High Court held that the claim referred to in Section 64 was the claim of the decree-holder enforceable under the attachment. In view of the peculiar facts of the

case, therefore, it could not be said that the claim of the decree-holder, who was opposite Party No. 1 was not enforceable under the attachment, pending which the petitioners made their purchase. Moreover, the Report shows that the two Allahabad cases cited above were also cited before the Calcutta High Court in that case, and the High Court distinguished these two cases the decree-holder had made an auction purchase at a subsequent attachment and he then brought a suit to declare a transfer made during a previous attachment void. Similarly, the aforesaid Patna case was also distinguished by the Calcutta High Court observing that in that Patna case a mortgagee pending an attachment brought the suit for a declaration that an auction-purchase made by the decree-holder at a subsequent attachment was made subject to his mortgage. It is no doubt true that the Calcutta High Court has observed at page 736 thus:-

"As regard the other case, we must disagree in so far as they support the proposition that where an attachment has been made, a private transfer contrary to such attachment may not be void as against a claim enforceable under the attachment on the ground that the attachment has ceased".

But nevertheless, this decision cannot help the present appellant in support of the proposition that when there are two attachments levied on one and the same property one after the other, and the first attachment has come to an end and the decree-holder has enforced his claim under the second attachment and has purchased the property at an auction sale in execution proceedings in which the second attachment was levied, the private transfer made during the subsistence of the first attachment become void. On the contrary, as we have already pointed out, in such a case, the claim of the decree-holder cannot be said to be enforceable under the first attachment and, therefore, the private transfer made during the subsistence of the first attachment cannot be said to be void u/s 64, Civil P.C.

14. We are, therefore, the opinion that the sale by defendant No. 2 in favour of the plaintiff in the instance case cannot be said to be void u/s 64, Civil P.C. and must be held as perfectly valid in law. Defendant No. 1 therefore, cannot acquire any title to the plot of land in dispute at the auction sale held in execution proceeding being Darkhast No. 630 of 1959.

15. The learned Counsel Mr. Bhadti then argued that at any rate in the instant case, the learned appellate Judge wrongly threw the onus of proof on defendant No. 1 to prove that the sale was not fraudulent. In the first place, we do not find from the record that defendant No. 1 had challenged the sale on the ground that it was fraudulent. all that he had contended was that the sale was bogus, sham, fictitious, colourable, and without consideration. The learned trial Judge framed the issue No. 2A on this point casting onus on defendant no. 1 to prove that the sale-deed was bogus, sham, etc. The learned Counsel had no quarrel regarding the onus of proof placed on defendant No. 1 for proving this issue No. 2A. The learned appellate judge, while drawing the points for determination, raised the point in these terms: "Whether the disputed sale-deed is bogus, sham,

colourable, fictitious and without consideration and the respondent No. 2 had continued to be the owner and in possession of the suit plot?" He, therefore, did not place onus in respect of this point either on the plaintiff or on defendant no. 1. The learned Counsel, however, has drawn our attention to the discussion on this issue in paragraphs 15 to 19 of the judgment and has argued that this discussion shows that the onus was wrongly thrown on defendant No. 1. We cannot agree. It appears from the discussion that the learned Judge has considered the evidence adduced by the parties on both the sides, and the plaintiff having proved his sale-deed and the consideration for the same, he was of the view that defendant No. 1 who alleged that the transfer was without consideration, bogus and fictitious, had failed to prove it. We, therefore, do not think that the onus was wrongly thrown on defendant No. . Moreover, the parties on both the sides having adduced evidence in this case, having question of onus becomes only academic.

16. Lastly, the learned Counsel contended that the learned appellate Judge misread the oral evidence and invited our attention to paragraph 17 of his judgment. We have carefully gone through this paragraph and we are of the opinion that the learned Judge correctly appreciated the evidence and there is no question of misreading any part of it. We, therefore, do not find any substance in this contention either.

17. The result, therefore, is that the decree passed by the lower appellate Court must be confirmed and the appeal is dismissed with costs.

18. Appeal dismissed.