

(1928) 11 BOM CK 0006

In the Bombay High Court

Case No : Second Appeal No. 61 of 1927

Narayan Kondaji Temkar

APPELLANT

Vs

Govind Krishna Abhyankar

RESPONDENT

Date of Decision : 30-11-1928

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 88, 89
Transfer of Property Act, 1882 — Section 52

Citation : (1929) 31 BOMLR 345

Hon'ble Judges : Madgavkar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Madgavkar, J.—The question in this appeal is whether defendant No. 5-appellant, by reason of his vendors' purchase of the interest of Kanoji at the sale in 1920 held under Sections 88 and 89 of the Code of Criminal Procedure is entitled to the property as against the plaintiff-respondent who is a decree-holder in a suit for specific performance against the same Kanoji instituted on August 24, 1927, Both the lower Courts decided that the attachment by the civil suit by the plaintiff-respondent being prior, the doctrine of lis pendens applied to the sale by the criminal Court to the appellant, and decreed the claim. Defendant No. 5 appeals.

2. The relevant facts are shortly as follows : There was an agreement by Kanoji to sell the plaint property to the plaintiff-respondent, dated August 2, 1916. The respondent's suit No. 164 of 1917 was filed on August 24, 1917, was decreed on November 30, 1920, in favour of the plaintiff-respondent and directed Kanoji and his sons to execute the sale deed and the respondent to take possession. During the pendency of the suit Kanoji, who was being criminally prosecuted, absconded. The Magistrate issued a proclamation on January 19, 1917, and ordered him to appear by February 25, 1917. Kanoji failed to appear and the plaint property was attached by the Magistrate on December 8, 1917, and was

sold on July 29, 1920. The suit was decreed on November 30, 1920.

3. Four points are taken for the appellant. It is argued, firstly, that the words in Section 88, Clause 7, of the Code of Criminal Procedure "at the disposal of Government" imply that from the moment the absconder fails to appear on the date ordered, in this case February 25, 1917, all his right, title and interest in the property immediately passed over to Government. Secondly, and therefore, there was no title of Kanoji left to sue on August 24, 1917, when the plaintiff instituted the suit. Thirdly, Section 52 of the Transfer of Property Act, whatever application it might have to parties to the suit or to the civil Court which acts for the parties, has no application to Magistrates or criminal Courts acting on behalf of Government. Fourthly, the suit should have been filed within a year of the date of the sale by the criminal Court and is barred by limitation under Article 14 of the Indian Limitation Act.

4. On the first point the only authority quoted is Golam Abed v. Toolseeram (1883) ILR 9 Cal. 861. There the conflict was between the prior attachment by the Magistrate as against the subsequent attachment by the civil Court, The former being prior prevailed. In the present case the attachment of the civil Court was prior and not that of the Magistrate, Further, on the very wording of Section 88, Clause 7, "property under attachment shall be at the disposal of Government", the argument is, in my opinion, untenable. In other words, while the right and power of Government to attach begin from the time for appearance specified in the proclamation, the exercise of the power must begin with the attachment. To the same effect is the view taken by a single Judge in Subramonian v. Emperor (1912) 13 Cr. L.J. 568 where Government, though they had possess- ed power prior to the attachment by the civil Court, did not actually exercise it until afterwards. That point, therefore, fails.

5. On the second point, it suffices to observe that an attachment confers no title but merely prevents alienation. If authority is needed for this proposition, I may refer to the decision of the Privy Council in Moti Lal v. Karrabuldin I.L.R.(1897) Cal, 179

6. On the third point, it has been held by all the High Courts that the doctrine of *Us pendens* applies not merely to sales by private parties but also to Bales through civil Courts or by Government including revenue sales: Har Shankar Prasad Singh v. Shew Gobind Shaw I.L.R(1899) . Cal. 966; Sukhdeo Prasad v. Jamna I.LR (1900) All. 60; Bhaskar Mahadev Parsekar Vs. Shankar Vithal Pednekar, ; and Mathura Prasad Sahu v. Dasai Sahu I.L.R(1922) . 1 Pat, 287. But if the doctrine applies to revenue sales which are held for and by Government through revenue Courts under powers analogous to those exercised by the criminal Courts, there appears no reason for the exception of criminal Courts and attachment by them u/s 88, Criminal Procedure Code, from the purview of Section 52 of the Transfer of Property Act and the doctrine of *lis pendens*. Without express enactment, it would hardly be logical to hold that the Crown executing civil or fiscal laws is governed by a law other than that applicable to it

when executing criminal laws.

7. The only point which remains is the point of limitation, This point was not taken in the lower appellate Court and is not mentioned in the memo of appeal. It appears that the plaintiff was actually in possession before the suit. The suit is not, therefore, barred by limitation.

8. In the result the appeal fails and is dismissed with costs.