
(1933) 09 AHC CK 0032
In the Allahabad High Court

Suraj Deo Tewari

APPELLANT

Vs

Suraj Narain Man Tewari and Others

RESPONDENT

Date of Decision : 08-09-1933

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 64

Citation : AIR 1933 All 953 : 147 Ind. Cas. 482

Hon'ble Judges : Rachhpal Singh, J; Rachhpal Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Rachhpal Singh, J.—This is a defendant's second appeal. The facts which have given rise to this appeal are quite simple and are as follows:

Suraj Deo Tewari instituted a suit against Sureman Man Tewari and attached his immovable property before judgment. Eventually the suit was decreed in 1925. The Mofassil Bank obtained a decree against the defendant 2 on the 21st September 1925. This decree was passed after the decree in favour of the defendant 1. On the 9th November 1926, the plaintiff purchased the property of the defendant 2 which had been sold at a Court auction in execution of the decree of the Mofassil Bank. Later on, Suraj Deo Tewari, defendant 1, in execution of his decree attached the same property and put it to sale. The plaintiff filed objections under Rule 58, Order 21, Civil P.C., objecting to the sale on the ground that he was the owner of the property which had been attached, but these objections were thrown out. Before the date fixed for the sale the plaintiff paid the money due to the defendant 1 under protest. He made an application to the Court in which he stated that he was making the payment in order to avoid the sale of the property which he had purchased at a Court auction and that he was doing so under protest. On this payment the property was released from attachment. The plaintiff instituted a suit against defendants 1 and 2 to recover a sum of Rs. 1,603-8-0. The Courts below decreed the suit of the plaintiff as against defendant 1 only who had got the money deposited by the

plaintiff under protest. The suit as against defendant 2 was dismissed. The only question for consideration in this case is whether the plaintiff's suit has been rightly decreed. We have heard the learned Counsel for the appellant, and in our opinion the decree of the lower appellate Court is not open to any objection and must, therefore, be sustained. It is true that the defendant 1, when he instituted his suit applied for attachment before judgment of the property which was eventually sold and purchased by the plaintiff. That attachment before judgment did not confer any right on the defendant 1. It did not create a charge in his favour. Section 64 of the Civil P.C., lays down that:

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.

2. In the case before us the property was sold under the orders of a Court in execution of a decree, and it cannot, therefore, be contended that it was an alienation by the judgment-debtor. As we have already said, this section does not create a charge in favour of the creditor who gets an order of attachment before judgment. The position was, therefore, this. The plaintiff had become the owner of the property before the defendant 1 applied for its sale. The objections of the plaintiff under Rule 58, Order 21, Civil P.C., must be dismissed. If he wished to avoid a sale of his property, it was open to him to make the payment to the defendant 1 under protest, and this is the course which he adopted. Under the provisions of Section 72 of the Indian Contract Act, the plaintiff was certainly entitled to recover the amount paid by him. under coercion. On this point we have the ruling of their Lordships of the Privy Council reported in *Kanhaya Lal v. National Bank of India Ltd.* (1913) 40 Cal. 598. The learned Counsel for the appellant contended that as the objections of the plaintiff under Rule 58, Order 21, Civil P.C., had been thrown out, the only remedy which he had was to institute a regular suit for a declaration of his right as provided for by Rule 63, Order 21 of the Code of Civil Procedure. We find ourselves unable to agree with this contention. It is true that where objections under Rule 58, Order 21, Civil P.C., are dismissed, then the party against whom an order is made has one year within which to institute a suit to establish his right to that property; otherwise that order passed under Rule 58, will be conclusive. That order certainly is conclusive but, so far as the pleadings in the present case are concerned, we have nothing to do with. it. It was open to the plaintiff to have instituted a suit if he wished under the provisions of Rule 63, Order 21 of the Civil P.C., but he did not do so. The only question for our consideration is whether the payment which was made by him in order to avoid the sale of his property was a voluntary payment or an involuntary payment made under compulsion. We are of opinion that the payment was made under compulsion, and, therefore, the plaintiff was entitled to recover it from the person who had put to sale the property of which the plaintiff was owner and to which the judgment-debtor had absolutely no right at the date on which it was put to sale.

3. For the above reasons we are of opinion that the judgment of the lower appellate Court is correct, and we dismiss the appeal with costs.