APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H.C. 1948

Mar. 1.

DAW KYU AND ONE (APPELLANTS)

v.

A.S.P.L.V.R. RAMASWAMY CHETTIAR (RESPONDENT).*

Attachment of immovable property—Order for sale under Rule 64 of Order 21—Effect of attachment—Subsequent mortgage suit—Attaching creditor not made party—Purchase in money decree—Suit for declaration that preliminary mortgage decree fraudulent—Properties sold under mortgage decree during the pendency of that suit—lis pendens—*S. 52, Transfer of Property Act—How long* lis pendens *continues.*

Held: Attachment (unaccompanied by any order for sale) creates a charge over the property in the general sense of the word but not in its legal sense; such general charge does not create any interest in the attached property in favour of the attaching creditor.

Baiju Lal Marwari v. *Thakur Prasad Marwari*, I.L.R. 18 Pat. 157; Mayne on Hindu Law (9th Edn.), p. 450, followed.

Bunsi Koer v. *Sheo Proshad Singh*, (1879) L.R. 6 I.A. 88, explained.

Moti Lall v. *Karrah-ul-din*, (1879) L.R. 24 I.A. 170; *Raghunath Das* v. *Sunder Das Khetri*, (1914) L.R. 41 I.A. 251; *Gummidelli Anantapadmanabhaswami* v. *Official Receiver*, (1933) L.R. 60 I.A. 167; *Kristnasawmy Mudaliar* v. *Official Assignee*, I.L.R. 26 Mad. 673; *Frederick Peacock* v. *Madan Gopal*, I.L.R. 29 Cal. 428 (F.B.), referred to.

Such attaching creditor is not a necessary party in a mortgage suit under Order 34, Rule 1, of the Code of Civil Procedure.

Baiju Lal Marwari v. *Thakur Prasad Marwari*, I.L.R. 18 Pat. 157; *Subramania* v. *Sinnamal*, I.L.R. 53 Mad. 881 (F.B.); *Mahanth Singh* v. *Arjandas*, A.I.R. (1936) Nag. 209, followed.

Held by Chief Justice: Principle of *lis pendens* applies to involuntary sales.

Purchaser under a sale in execution of money decree is affected by the doctrine of *lis pendens* if he purchased during the pendency of a mortgage suit. His subsequent suit to declare the preliminary mortgage decree as fraudulent which is later dismissed does not keep alive the right of *lis pendens* for his benefit.

E. C. V. Foucar for the appellants.

P. K. Basu for the respondent.

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*Civil 1st Appeal No. 87 of 1941 against decree of High Court of Judicature at Rangoon in Civil Regular No. 214 of 1940 in its Original Civil Jurisdiction.

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U SAN MAUNG, J.—This is an appeal against the judgment and decree of the High Court of Judicature at Rangoon in Civil Regular Suit No. 214 of 1940. In that suit, the plaintiff-respondent A.S.P.L.V.R. Ramaswamy Chettyar sued one U Ba Tin for a declaration that he was entitled to redeem the property known as No. 15, Insein Road, Kamayut, which was mortgaged to U Ba Tin by one Daw Thein Mya on the 1st January 1935 for a sum of Rs. 5,000 by the deposit of title deeds. The plaintiff obtained the decree sought for by him, and the appeal against the decree by the defendant U Ba Tin was still pending in the High Court of Judicature at Rangoon at the time of the general evacuation in February 1942. Both the original and the appellate proceedings are no longer traceable now. Fortunately, the facts, which were said to be not in dispute, have been fully set out in the judgment dated 11th July 1941. Briefly put, they are as follows :

On the 1st January 1935 the suit property was mortgaged to U Ba Tin by Daw Thein Mya as already mentioned. On the 4th December 1936, the plaintiff obtained a decree against Daw Thein Mya for Rs. 33,304-7-6, and in execution of that decree attached the suit property. On the 22nd February 1939, before the suit property could be sold, the defendant U Ba Tin filed a suit (Civil Regular No. 46 of 1939) against Daw Thein Mya for the recovery of Rs. 8,500 due on his mortgage, and the usual preliminary decree was passed on the 13th March 1939. To that suit the plaintiff was never a party. On the 6th May 1939 the right, title and interests of Daw Thein Mya were sold to the plaintiff in execution of his decree, and on the 8th December 1939 the plaintiff filed a suit (Civil Regular No. 246 of 1939) against U Ba Tin and Daw Thein Mya to set aside the preliminary mortgage decree as having been obtained by fraud and collusion.

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On the 26th December 1939 U Ba Tin sent a letter to the plaintiff to redeem the suit property. This the plaintiff declined to do on the ground that his last mentioned suit was pending. On the 6th November 1939 the defendant U Ba Tin obtained a final decree in his mortgage suit and in pursuance of that decree the "right, title and interests" of the mortgagor (Daw Thein Mya) were again sold on the 18th May 1940 to the defendant U Ba Tin himself. The sale was confirmed on the 24th June 1940, and on the 7th August 1940 the plaintiff offered to redeem the suit property, and with this end in view asked for particulars of the defendant's claim. As this offer was refused the plaintiff brought the suit, now under appeal, for a declaration that he was entitled to redeem the mortgage and for consequential relief. The defendant contended that in the events that had happened, the plaintiff had no longer any right to redeem the suit property of which he (the defendant) had become the absolute owner by virtue of his purchase of the 18th May 1940. The suit was decreed by the trial Judge (Blagden J.) mainly on the ground that the "right, title and interests" of the mortgagor Daw Thein Mya, having been extinguished by the sale of the 6th May 1939, could not be sold again to the defendant on the 18th May 1940, and that in any event the defendant could not have acquired any title to the suit property by a purchase which was made during the pendency of the plaintiff's suit to set aside the preliminary mortgage decree.

Hence the appeal by U Ba Tin, and I ought to mention that Daw Kyu and Daw Tin, whose names now appear on the record as appellants, are the assignees of the original appellant U Ba Tin.

For the purpose of this appeal, two points appear to arise for decision ; (1) whether the plaintiff obtained a charge on the suit property by virtue only of his

attachment thereof, and (2) whether the plaintiff was a person who should have been joined in the mortgage suit under Order 34, Rule 1, of the Civil Procedure Code as one having an interest in the right of redemption of the suit property.

As regards (1), it would appear that Mr. Doctor, who appeared for the plaintiff at the hearing of the suit, had admitted that the plaintiff had obtained no charge on the suit property by virtue only of his attachment hereof. In appeal, Mr. Basu for the plaintiff-respondent contends that Mr. Doctor was in error in making that admission, and that, in any event, the plaintiff must be deemed to have obtained a charge on the suit property after the Court had passed an order for its sale.

As to this latter contention, it must be pointed out that there is nowhere in the judgment (which, as I have already mentioned, is the only document to be relied upon for the facts of this case) anything to show that, in fact, the order for sale was passed by the Court on a date prior to the 22nd February 1939 when the mortgage suit was filed by U Ba Tin or to the 13th March 1939 when the usual preliminary mortgage decree was passed in favour of U Ba Tin. Therefore, it is only necessary to consider whether the plaintiff obtained a charge on the suit property by virtue only of his attachment thereof.

Now, in the case of *Baiju Lal Marwari* v. *Thakur Prasad Marwari* (1) where a Bench of the Patna High Court held that an attachment does not create any title in or charge upon the attached property, Chatterji J. who wrote the judgment in that case observed that the effect of an attachment was merely to prevent private alienations, that if an attachment did have the effect of creating a charge upon the attached property a Court

(1) I.L.R. 18 Pat. 157.

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sale would be affected by such a charge, and that the contention that an attachment created a charge was inconsistent with the provisions of section 73 and Order 21, Rule 57, of the Civil Procedure Code. With great respect, I must say that I entirely agree with the observations made by him on these points.

The learned Judge also relied upon the dicta of their Lordships of the Privy Council in the case of *Moti Lall* v. *Karrah-ul-din* (1) and *Raghunath Das* v. *Sunder Das Khetri* (2) for the proposition that attachment merely prevents private alienation but does not confer any title. These are also the cases relied upon by the learned counsel for the appellants. On the other hand, Mr. Basu for the respondent Chettyar relies upon the earlier case of *Suraj Bunsi Koer* v. *Sheo Proshad Singh and others* (3) for the broad proposition that attachment creates a charge upon the attached property. He argues that the authority of the decision in *Moti Lall* v. *Karrah-ul-din* (1) and *Raghunath Das* v. *Sunder Das Khetri* (2) have been entirely shaken by the following observation of their Lordships of the Privy Council in *Gummidelli Anantapadmanabhaswami* v. *Official Receiver of Secunderabad* (4):

"In *Kristnasawmy Mudaliar* v. *Official Assignee of Madras* (5) the Court appears to have ignored the opinion expressed by this Board in *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (3) which was cited to them, and to have taken a dictum in the judgment of this Board in *Moti Lall* v. *Karrah-ul-din* (1) from its context and used it for a purpose which it did not have in view. In *Frederick Peacock* v. *Madan Gopal* (6) the case of *Suraj Bunsi* (3) was not referred to, and the dictum from *Moti Lall's* case (1) was similarly employed. Their Lordships desire to reserve their opinion as to the soundness of the Madras and Calcutta decisions. The decision of this Board in *Raghunath Das* v. *Sunder Das Khetri* (2) was also

(1) (1897) L.R. 24 I.A. 170.
(2) (1914) L.R. 41 I.A. 251.
(3) (1879) L.R. 6 I.A. 88.
(4) (1933) L.R. 60 I.A. 167 = 56 Mad. 405.
(5) I.L.R. 26 Mad. 673.
(6) I.L.R. 29 Cal. 428 (F.B.)

referred to, but that decision proceeded on an admission by counsel, the point was not argued and the case of *Suraj Bunsi* (1) was not referred to."

In my opinion, the above observation was made when their Lordships of the Privy Council realized that the Board had on two separate occasions spoken with two different voices on the question involved and felt that the best way of withdrawing from a somewhat untenable position was to take up a non-committal attitude on the point. It seems to me that when, in *Suraj Bunsi Koer*'s case (1), their Lordships spoke of an attachment as constituting a "charge" in favour of the judgment-creditor they were using the term in a general and not in a strictly legal sense. This is the view expressed by Mr. Mayne, with reference to this case, in his treatise on Hindu Law (9th Edition at page 450).

For these reasons I hold that the plaintiff in the case under appeal did not obtain a charge on the suit property by virtue only of the attachment thereof.

I should mention, in passing, that the cases reported in 26 Madras and 29 Calcutta referred to by the Privy Council in *Gummidelli Anantapadmanabhaswami* v. *Official Receiver of Secunderabad* (2) are some of the cases relied upon by Mr. Foucar for the appellants.

As regards the question whether the plaintiff should have been made a party to the mortgage suit as a person having an interest in the right of redemption of the suit property within the meaning of Order 34, Rule 1, of the Civil Procedure Code, the Full Bench case of the Madras High Court [*Subramania* v. *Sinnamal and two others* (3)] is of great authority. There it was held that an attaching creditor is not a necessary party

(1) (1879) L.R. 6 I.A. 88. (2) (1933) L.R. 60 I.A. 167 = 56 Mad. 405.
(3) I.L.R. 3 Mad. 881.

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within the meaning of Order 34, Rule 1, Civil Procedure Code, to a suit by a mortgagee and that if, under the decree in the mortgage suit to which he is not a party the property is sold before he redeems it, he loses the right to redeem which was given to him by clause (*f*) of section 91 of the Transfer of Property Act (since repealed).

In this connection, I would respectfully adopt the following observations of Chatterji J. in *Baiju Lal Marwari* v. *Thakur Prasad Marwari* (1) which I have already cited earlier in this judgment :

" Under the express provision of the old section 91, clause (*f*), an attaching decree-holder would be entitled to redeem or institute a suit for redemption. But still the question remains whether such right would amount to an interest in the right of redemption within the meaning of Order 34, Rule 1, of the Civil Procedure Code. Apparently it may look as if a person who is entitled to redeem has an interest in the right of redemption. But upon a comparison of the clauses (*b*) and (*f*) of the old section 91 it will appear that the Legislature recognized a distinction which puts an attaching decree-holder in a different position from a person having an interest in the right of redemption, otherwise the separate provision in clause (*f*) for the attaching decree-holder, if really he could come under clause (*b*) as a person having an interest in the right of redemption, would be quite redundant. Section 91 enumerates the class of persons entitled to redeem and amongst them those who have an interest in, or charge upon, the property or the right of redemption are put under clauses (*a*) and (*b*) of the old Act which correspond to clause (*a*) of the new Act. Such persons only, in my opinion, come under the purview of Order 34, Rule 1, of the Civil Procedure Code. Looking to the plain phraseology of the different clauses of old section 91 of the Transfer of Property Act, it is rather difficult to hold that an attaching creditor coming under clause (*f*) has the same interest as a person coming under clause (*b*) of that section. *A fortiori* an attaching decree-holder does not fall within the class of persons contemplated by Order 34, Rule 1, of the Civil Procedure Code."

(1) I.L.R. 18 Pat. 157.

The decision in the case of *Mahant Amardas and others* v. *Jailalsao and others* (1) is to the same effect. This case was distinguished by Blagden J. on the ground that the plaintiffs (*Mahant Amardas and others*) purchased the mortage property after (and not as in the present case before) the final decree for foreclosure. However, the learned Judge had overlooked the fact that the plaintiffs, on realizing the futility of their second ground that they had a right to redeem the mortgage as purchasers of the equity of redemption, abandoned it in the course of the argument and relied solely on the right of redemption arising in their favour as attaching creditors and that the question which was referred for the opinion of the Bench was, "Whether an attaching creditor who attaches property subject to a mortgage is entitled to redeem the mortgage after he purchases the property in execution *simply on the strength of his attachment.*" (The italicized is mine.) *Mahant Amardas and others* v. *Jailalsao and others* is therefore not distinguishable from the present case in so far as the question involved for decision is concerned.

In my opinion, one of the tests to be applied in considering whether a person has an interest in the right of redemption of a mortgaged property is whether that person has in law, the right to transfer such an interest to another by executing a deed of transfer. Obviously an attaching creditor has no such right merely by virtue of his attachment and therefore he is not a person having an interest in the right of redemption within the meaning of Order 34, Rule 1, Civil Procedure Code.

For these reasons I hold that the plaintiff-respondent in the case under appeal was not a necessary party to the mortgage suit filed by U Ba Tin against Daw Thein Mya.

(1) A.I.R. (1936) Nag. 209.

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As the purchase of the suit property was made by the plaintiff-respondent after the preliminary mortgage decree was passed in the mortgage suit by U Ba Tin, the only right which the plaintiff had acquired was that which Daw Thein Mya then had, namely, the right to redeem the property before the final decree was passed. The plaintiff must now abide by the result of his own action in refusing to redeem the property when he was called upon by U Ba Tin to do so.

In the result the appeal succeeds. The judgment and decree of the High Court of Judicature at Rangoon appealed against are set aside and the plaintiff-respondent's suit dismissed with costs. Advocate's fees in this appeal twenty (20) gold mohurs.

U THEIN MAUNG, C.J.—I agree and I have very little to add. The learned Judge who decided the case on the Original Side attached undue importance to the purchase by the mortgagee in execution of the final mortgage decree having been during the pendency of the respondent's suit (Civil Regular Suit No. 246 of 1939) to set aside the preliminary mortgage decree and attached little or no importance to the respondent's own purchase of the same property having been during the pendency of the mortgagee's suit (Civil Regular Suit No. 146 of 1939) in the same Court.

Under section 52 of the Transfer of Property Act, immovable property cannot be transferred or otherwise dealt with during the pendency of a suit so as to affect the rights of any other party thereto under any decree or order which may be made therein. However, the respondent's suit has been dismissed and he cannot claim that any right of his under the decree therein has been affected by the sale to the mortgagee. On the other hand the respondent's purchase during the pendency of the mortgagee's suit and after the passing

of the preliminary decree for sale therein cannot affect the rights of the mortgagee under any decree or order which may be made in that suit and the mortgagee has purchased the property in execution of the final decree therein. Though section 52 itself may not apply to involuntary sales, the principle of *lis pendens* applies to such alienations. (See Mulla's Transfer of Property Act, 2nd Edition, page 233 and the cases cited thereat.)

The respondent, who refused to redeem the mortgage although he was actually called upon to do so by the mortgagee, must now take the consequences of his own failure to redeem the mortgage in time. [*Cf.* Illustration (1) at page 233, *ibid*, which is an adaptation of *Radhamadhub Holdet* v. *Monohur*, 15 I.A. 97.]