

Vannarakkal Kallalathil Sreedharan

Vs

Chandramaath Balakrishnan and Another

Civil Appeal No. 1349 of 1990

(R. M. Sahai, K. Jagannatha Shetty JJ)

06.03.1990

JUDGMENT

K. JAGANNATHA SHETTY, J. -

1. Special leave granted.

2. An extent of 80 cents of land which is in dispute in this appeal was agreed to be sold in favour of the appellant under an agreement dated October 9, 1978. Before the sale deed was executed, a third party in execution of a decree got the property attached on November 16, 1978. The state deed was executed on November 23, 1978. The question is; Does the sale prevail over the attachment ?

3. The High Court of Kerala in the judgment under appeal has held that the sale would be subject to attachment. This appeal from the following observation :

"The sale deed was executed at a time when the property was already under attachment. It is true that even before effecting attachment there was an agreement for sale by Sarojini Ramakrishnan in favour of the appellant. But the agreement for sale will not create any interest in the property. The fact that Ex. A-12 sale deed was executed on the basis of an agreement executed before the attachment will not place the appellant in any better position. He could take the 80 cents under Ex. A-12 only subject to the attachment."

4. The correctness of the view taken by the High Court has been called into question in this appeal.

5. We may first draw attention to some of the relevant statutory provisions bearing on the question. Order XXXVIII Rule 10 of the Code of Civil Procedure provides that attachment before judgment shall not affect the rights existing prior to the attachment of persons not parties to the suit. Under Section 40 of the Transfer of Property Act, a purchaser under a contract of sale of land is entitled to the benefit of an obligation arising out of that contract and it provides that that obligation may be enforced inter alia against a transferee with notice. Section 91 of the Trusts Act also recognises this principle that the transferee with notice of an existing contract of which specific performance can be enforced must hold the property for the benefit of the party to the contract. These are equitable rights though not amounting to interest in immovable property within the meaning of Section 54 of the Transfer of Property Act which declares that a contract of sale does not create an interest in the property. On this line of reasoning it has been held by the Madras High Court that the purchaser of (sic under) an antecedent agreement gets good title despite attachment. See Paparaju Veeraraghavayya v. Killaru Kamala Devi (AIR 1935 Mad 193 : 68 MLJ 67), Veerappa Thevar v. C.

S. Venkatarama Aiyar (AIR 1935 Mad 872 : 69 MLJ 678) and Angu Pillai v. M. S. M. Kasiviswanathan Chettiar (AIR 1974 Mad 16 : (1973) 1 MLJ 334).

6. There is a useful parallel from the decision of the Calcutta High Court in Purna Chandra Basak v. Daulat Ali Mollah (AIR 1973 Cal 432) wherein it was observed that the attaching creditor attaches only the right, title and interest of the debtor and attachment cannot confer upon him any higher right than the judgment-debtor had at the date of attachment.

7. Hence under a contract of sale entered into before attachment the conveyance after attachment in pursuance of the contract passes on good title in spite of the attachment. To the effect are the decisions of the Bombay High Court in Rango Ramachandra Kulkarni v. Gurlingappa Chinnappa Muthal (AIR 1941 Bom 198 : 43 BLR 206) and Yeshvant Shankar Dunakhe v. Pyaraji Nurji Tamboli (AIR 1943 Bom 145 : 45 BLR 208). The High Court of Travancore-Cochin in Kochuponchi Varughese v. Ouseph Lonan (AIR 1952 TC 467 : ILR 1952 TC 201) has also adopted the same reasoning.

8. The Punjab & Haryana High Court, however has taken a contrary view in Mohinder Singh v. Nanak Singh (AIR 1971 P & H 381 : 73 Punj LR 257). It has been held that a sale in pursuance of pre-attachment agreement is a private alienation of property and must be regarded as void against the claim of the attaching creditor. In support of this proposition. Section 64 of the Code of Civil Procedure was relied upon which according to the High Court of Civil Procedure was relied upon which according to the High Court was intended to protect the attaching creditor against private alienation. This was also the observation of the Lahore High Court in Buta Ram v. Sayyad Mohammad (AIR 1935 Lah 71 : 14 Lah 328).

9. In our opinion, the view taken by the High Courts of Madras, Bombay, Calcutta and Travancore-Cochin in the aforesaid cases appears to be reasonable and could be accepted as correct. The attachment for sale indeed creates an obligation attached to the ownership of property and since the attaching creditor is entitled to attach only the right, title and interest of the judgment-debtor, the attachment cannot be free from the obligations incurred under the contract for sale. Section 64 CPC no doubt was intended to protect the attaching creditor, but if the subsequent conveyance is in pursuance of an agreement for sale which was before the attachment, the contractual obligation arising therefrom must be allowed to prevail over the rights of the attaching creditor. The rights of the attaching creditor shall not be allowed to override the contractual obligation arising from an antecedent agreement for sale of the attached property. The attaching creditor cannot ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor. We cannot, therefore agree with the view taken by the Punjab and Haryana High Court in Mohinder Singh case (AIR 1971 P & H 381 : 73 Punj LR 257).

10. In the conclusion that we have reached, this appeal must be allowed and is accordingly allowed. The order of the High Court is reversed and that of the trial court is restored.

11. In the circumstances of the case, we make no order as to costs.

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