

Hamda Ammal

Vs

Avadiappa Pathar and 3 Others

Civil Appeal No. 110 of 1984

(Dr. T.K. Thommen, K.N. Saikia, N.M. Kasliwal JJ)

07.11.1990

JUDGMENT

KASLIWAL, J. –

1. This civil appeal by special leave is directed against the judgment of High Court of Judicature at Madras dated December 24, 1982. This case raises a short but an important question of law. We would narrate only such facts of the case which are necessary for the disposal of the question of law raised in the case. The appellant Hamda Ammal purchased the suit property from the respondents Govindraju Pathar, Muthulinga Asari and Gurusami Pathar (hereinafter referred to as 'the vendors') by a sale deed executed in her favour on September 9, 1970. Hamda Ammal got the sale deed registered on October 26, 1970. Before registration of the sale deed, respondent Avadiappa filed a money suit for the recovery of Rs. 5200 on September 13, 1970, against the vendors and obtained attachment before judgment of the property in question on September 17, 1970. Subsequently the aforesaid money suit filed by Avadiappa was also decreed in his favour. The question which calls for consideration is whether Hamda Ammal is entitled to the property sold in her favour by virtue of sale deed dated September 9, 1970 but registered subsequently on October 26, 1970, or Avadiappa has a better claim to the property on account of an attachment before judgment made on September 17, 1970 in the suit filed by him on September 13, 1970 i.e. prior to the date of registration of sale deed in favour of Hamda Ammal.

2. In order to decide the above controversy we would advert to some relevant provisions. Order XXXVIII Rule 5 CPC which provides the conditions for attachment before judgment reads as under :

"5. (1) Where at any stage of a suit, the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, -

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court,

the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show

cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void."

The above provision itself makes it clear that the attachment before judgment would be made where the court is satisfied that the defendant is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of court with the intention to obstruct or delay the execution of any decree that may be passed against him. Thus this provision would not apply where the sale deed has already been executed by the defendant in favour of a third person. A transaction of sale having already taken place even prior to the institution of a suit cannot be said to have been made with the intention to obstruct or delay the execution of any decree. It would be a different case altogether if a creditor wants to assail such transfer by sale under Section 53 of the Transfer of Property Act, 1882 (hereinafter referred to as 'the Act') on the ground of a fraudulent transfer. Such suit would be decided on totally different consideration in accordance with the provisions of Section 53 of the Act. Order XXXVIII Rule 10 CPC reads as under :

"10. Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendants from applying for the sale of property under attachment in execution of such decree."

This provision also makes it clear that attachment before judgment shall not affect the rights, existing prior to the attachment, of person not parties to the suit.

3. Section 64 CPC prohibits private alienation of property after attachment and reads as under :

"64. 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 debts, dividend or other money 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 rateable distribution of assets."

The above provision bans or prohibits a private transfer or delivery of the property attached or of any interest therein contrary to such attachment as void as against all claims enforceable under the attachment. The order of attachment is issued on a prescribed Form No. 24 in Appendix E to CPC which prohibits and restrains defendant from transferring or charging the property by sale, gift or otherwise. Thus neither in Section 64 CPC nor in the form prescribed for attachment there is any prohibition for submitting the document of sale for registration. The act of submitting the sale deed for registration which has already been executed prior to an attachment is not an act of transfer which is prohibited under the above provisions.

4. Section 54 of the Act defines sale as "a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised". Thus after the execution of the sale deed with consideration all the ingredients of sale are fulfilled except that in case of tangible immovable property of the value of Rs. 100 and upwards it can be made only by registered instrument. Now, if we read Section 47 of the Registration Act, it clearly provides that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration. This provision makes it clear that after the registration it will relate back to the date of execution of the sale deed. The act of registration is to be performed by the registering authority. According to Section 23 of the Registration Act a document of the nature of sale deed shall be accepted for registration within four months from the date of its execution. Thus a statutory period of four months has been provided for presenting the sale deed for registration from the date of its execution. In case of dispute regarding the execution of the document an enquiry is permitted under Section 74(a) of the Registration Act and that may also take some time. The legislature being alive to such situations has already provided in Section 47 of the Registration Act that it shall operate from the time from which it would commence to operate if no registration thereof had been required or made and not from the time of its registration. Thus in our view the vendee gets rights which will be related back on registration from the date of the execution of the sale deed and such rights are protected under Order XXXVIII Rule 10 CPC read together with Section 47 of the Registration Act.

5. We cannot accept the contention of learned counsel for the respondent that till registration, the execution of the sale deed does not confer any rights whatsoever on the vendee. Even Section 49 of the Registration Act in its proviso inserted by Section 10 of the Transfer of Property (Amendment) Supplementary Act, 1929, negatives the above contention of the learned counsel. The above provision lays down that an unregistered document affecting immovable property and required by this Act or by the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as an evidence of part performance of a contract for the purposes of Section 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument. Thus even an unregistered document can be received as evidence for purpose mentioned in the proviso to Section 49 of the Registration Act.

6. Learned counsel for the respondents also made the submission that even if the sale deed which is executed earlier to attachment before judgment and registered subsequently may be binding on the vendors but it would not affect the rights of such respondent who is a third party, in the sense that he was not a party to the sale deed and he got the right in the property in a court sale having taken place after the passing of final decree in the money suit filed by Avadiappa. In other words the contention is that respondent 5 Shri M.S.A. Kadar got rights in the property in the court sale made in his favour after the decree passed in favour of Avadiappa in the money suit filed on September 13, 1970. We do not find any force at all in the above submission. The property in question admittedly belonged to the defendant-judgment debtors (vendors) and once it is held that a sale deed had already been executed by them in favour of Hamda Ammal on September 9, 1970 and only its registration remained, then neither the attachment before judgment nor a sub-sequent attachment or court sale in favour of respondent 5 can confer any title in his favour by preventing the relation back. The fact that the document of sale had not been registered until after the attachment makes no difference.

7. We shall now deal with some cases cited before us at the bar. *Ram Saran Lall v. Mst. Domini Kuer* ((1962) 2 SCR 474 : AIR 1961 SC 1747) was a case relating to pre-emption based on

Mohammedan law of pre-emption applied to the parties by custom. The only question for consideration before the court was whether the first demand called Talab-i-Mowasibat which has to be made after the completion of the sale in order that the right may be enforced, was made before or after such completion. The making of the demand was not in dispute but the dispute was as to when the sale was complete. A majority of Judges held (per Sinha, C.J., Sarkar and Mudholkar, JJ.) "that the sale was completed only on February 9, 1946, when the registration was complete, that the talab was made prematurely and that the suit must fail. Section 47 merely permitted a document when registered to operate from a date which may be earlier than the date on which it was registered, it did not say when the sale would be deemed to be complete. A sale which was required to be registered was not completed until the registration of the deed was completed." Minority view was that "the sale was completed on the day of execution and the talab was made at the right time. Section 61 had nothing to do with the time when the sale evidenced by the registered deed became complete; it refers merely to the fact that the registering officer had completed his duty. Section 47 provided when a sale was deemed to be completed. There was no difference between the time when a sale became effective and the time it could be held to be completed. Under Section 47 the crucial test for determining the time from which the registered document was to have effect or be deemed to be completed was the intention of the parties. The sale deed shows that the parties intended that the deed should be effective from the date of execution."

8. The above case related to pre-emption based on customary law of pre-emption of Mohammedans. The question for consideration in the case was regarding the first demand called 'Talab-i-Mowasibat' which was required to be made after the completion of the sale. In that context the majority view was that the sale becomes complete when it is copied out in the Registrar's books as provided in Section 61 of the Registration Act and Section 47 of the Registration Act cannot apply in such a case to hold that the sale was completed on the date of its execution. This case is not at all an authority for the controversy raised before us as it only dealt with the question as to when the sale became complete for making the first demand called 'Talab-i-Mowasibat' under the Mohammedan law of pre-emption.

9. In *Hiralal Agrawal v. Rampadarath Singh* ((1969) 1 SCR 328 : AIR 1969 SC 244) the controversy was about fixation of ceiling area and acquisition of surplus land under the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act of 1962. In the above case the facts were that by a deed of sale dated October 9, 1964 one Prembati Devi sold 2.62 acres of land to respondent 1 for Rs. 2000. The said deed was thereafter presented to the Sub-Registrar for registration. On October 14, 1964 the appellant applied for a certified copy of the said sale deed and on its being furnished to him he filed an application dated November 26, 1964 under Section 16(3) of the Act before the Collector. He annexed to his application the said copy of the sale deed and a copy of the challan evidencing his having deposited the sale price of Rs. 2000 and an additional sum of 10 per cent thereof as required by the proviso to Section 16(3)(i) and Rule 19 of the Bihar Land Reforms Rules, 1963. On November 30, 1964, the Registrar completed registration by endorsing his certificate on the said sale deed under Section 60(1) and copying out the endorsement and the certificate in the relevant register under Section 61(1) of the Registration Act, 1908. The appellant had in his said application claimed to be entitled as a co-sharer to the right of re-conveyance of the said land under Section 16(3) of the Act. On November 30, 1964 the Collector, on being satisfied that the application was proper, ordered possession to be given to the appellant under Section 16(3)(ii) pending its disposal. In the above case an argument was raised on behalf of the respondents that the application was premature as the registration of the sale deed was not completed on November 26, 1964 when the appellant presented the application and, therefore, it was not a case of completed transfer and the Collector had no jurisdiction to entertain such application as his

jurisdiction was dependent on a transfer having taken place. On the other hand argument was raised on behalf of the appellant that under Section 47 of the Registration Act once registration is effected, the title under the sale deed relates back to the date of its execution and, therefore, though registration was completed on November 30, 1964 the transferee's title under the sale deed related back to the date of its execution i.e. October 9, 1964. Assuming, therefore, that the application was presented on November 26, 1964, the transferee's title having related back to the date of the execution of the sale deed, the transfer must be deemed to be complete on that date and, therefore, it was not correct that the right of re-conveyance had not accrued to the appellant on November 26, 1964 or that the Collector had jurisdiction on that date to accept the said application. This contention made on behalf of the appellant was negated by placing reliance on *Ram Saran Lall v. Mst. Domini Kuer* ((1962) 2 SCR 474 : AIR 1961 SC 1747), *Radhakishan L. Toshniwal v. Shridhar Ramchandra Alshi* ((1961) 1 SCR 248 : AIR 1960 SC 1368) and *Bishan Singh v. Khazan Singh* (1959 SCR 878 : AIR 1958 SC 838). The court further observed in the above case that the question whether the right of re-conveyance had accrued to the appellant or not on November 26, 1964 appeared to be academic. It was observed in this regard that a mere presentation of the application or having handed it over to some subordinate in the Collector's office cannot mean its having been entertained by the Collector on that date. There was no merit in the contention that the Collector had entertained the application either on 26th when it was taken by the appellant to the Collector's office or on 28th when some subordinate in the office made an endorsement on it that it should be placed before the Collector. The endorsement on the contrary shows that the Collector had not even seen it much less, accepted it. The Collector took cognizance of it on November 30, 1964 only when it was placed before him and when on being satisfied with the conditions of Section 16 he passed his order for handing over the possession from the transferee to the appellant. The court further held that the fact that a copy of the registered deed was not furnished along with the application was, therefore, not fatal to the application nor did such omission deprive the Collector of his jurisdiction to entertain it nor did it vitiate the proceedings before him or the order thereon made by him. The court in view of the above findings allowed the appeal.

10. The court itself in the above case had observed that the question whether the right of re-conveyance had accrued to the appellant or not on November 26, 1964 appeared to be academic as it was held that the Collector took cognizance of the application on November 30, 1964 only when it was placed before him. The earlier cases cited before the court were all relating to the law of pre-emption. This case also as such is no authority for the controversy raised before us and is totally distinguishable on its own facts.

11. In *Vannarakkal Kallalathil Sreedharan v. Chandramaath Balakrishnan* ((1990) 3 SCC 291) a bench of two Judges considered a question identical to the question raised before us. The question was whether the sale prevailed over the attachment. The facts were that 80 cents of land were 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 sale deed was executed on November 23, 1978. On the above facts it was held as under : (SCC p. 292, para 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 the 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."

Their Lordships then considered that the same view has taken by the Bombay and Calcutta High Courts. The view taken by Punjab and Haryana High Court in Mohinder Singh v. Nanak Singh (AIR 1971 P&H 381 : 73 Punj LR 257) was overruled. It was observed as under : (SCC pp. 293-94, para 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 agreement 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)."

12. In the above case this Court has gone even to the extent that not only a sale deed but even an agreement of sale will prevail over attachment before judgment made subsequent to such agreement for sale. We do not want to express any opinion with regard to the case of an agreement for sale, but we are of the confirmed opinion that a sale deed having been executed prior to attachment before judgment, though registered subsequently will prevail over attachment before judgment.

13. Learned counsel for the respondent also placed reliance on Tilakdhari Singh v. Gour Narain (AIR 1921 Pat 150 : 2 PLT 95) and Raja Ram v. Girraj Kishore (AIR 1964 All 369 : 1963 All LJ 1104) in support of his contention. The above authorities no doubt support the contention of the learned counsel for the respondent but the above Patna case has been dissented in a later Patna case Faiyazuddin Khan v. Mst. Zahur Bibi (AIR 1938 Pat 134 : 1938 PWN 445). In the later case the facts were that a deed of baimokasa in respect of certain property was executed which required registration, but before the deed was registered, the property was attached and the document was subsequently registered. It was held that the document prevailed against the attachment as the document when registered took effect from the date of execution.

14. The only reason given in the above cases relied on by the counsel for the respondent was that the right to have the sale deed registered is a benefit which could not in law be availed of after the

attachment order has been made. Any act done after the attachment order for the purpose of giving effect to the transfer sought to be made must be held to be ineffective in law. The sale deed could not be operative unless it was registered and the right to have it registered was a right denied to the parties to the sale by reason of attachment. We have already given detailed reasons for the view taken by us and the above cases taking a contrary view do not lay down the correct law.

15. It may also be mentioned that apart from the later Patna view, Nagpur High Court in Champat Rao Mahadeo v. Mahadeo Bajirao Kunbi (AIR 1937 Nag 143) also have taken the view now taken by us.

16. We do not want to burden this judgment by referring to some other cases of the High Court which have been cited by the learned counsel for the respondent as the same do not deal with the question directly raised in the case before us. Those are cases either under the Provincial Insolvency Act or Mohammedan Law of Pre-emption. We may, however, make a mention of the case of Privy Council in Kalyanasundaram Pillai v. Karuppa Mooppanar (ILR 50 Mad 193 : AIR 1927 PC 42) which supports the view taken by us. In the above case a Hindu executed a deed of gift of part of his immovable property and delivered it to the donee. On the following day he adopted a son. Three days later the deed was registered. It was held, that the gift was valid against the adopted son. On delivery of the deed to the donee there was an acceptance of the transfer within Section 122 of the Transfer of Property Act, 1882, and thereupon the gift became final, subject to its registration as required by Section 123.

17. In the result we allow this appeal, set aside the order of the High Court dated December 24, 1982 and confirm the decision of the Subordinate Judge dated October 14, 1977, decreeing the suit of the plaintiff.

18. In the facts and circumstances of the case we direct that the parties shall bear their own costs.

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