

CALCUTTA HIGH COURT

Purna Chandra Basak

Vs.

Daulat Ali Mollah

Appeal from Appellate Decree No. 770 of 1960

(Debiprasad Pal, J.)

22.06.1973

JUDGMENT

Debiprasad Pal, J.

1. This second appeal arises out of a suit filed by the plaintiff-appellant for confirmation of his possession in the disputed property and for a permanent injunction upon a declaration of his title thereto. The plaintiff purchased the suit land from one Dud Ali Mollah under a registered kobala dated 22nd Ashar, 1361, B. S., corresponding to 7th July, 1954 and was in possession since the purchase of the property. The plaintiff's case is that the defendant had no title in the land and was wrongfully trying to interfere with his possession. The main defence of the defendant is that the suit property was attached in execution case No. 17 of 1954 on 19-05-1954 and the suit property was purchased by him in a court sale on 09-05-1955. Since then the defendant is stated to be in lawful possession of the suit property.

2. It is in evidence that Dud Ali Mollah to whom the suit land originally belonged entered into an agreement for sale of said property with the plaintiff. A Title Suit being Title Suit No. 155 of 1954 (Ext. 2) was instituted by the plaintiff against the said Dud Ali Mollah for the specific performance of the agreement for sale. In the said suit a compromise decree was made and as a result of the said compromise, the plaintiff purchased the suit property on 7th July, 1954. As already stated the very said property was attached in Execution Case No. 17 of 1954 on 19-05-1954, i.e., about two months prior to the plaintiff's purchase of the suit property. The defendant purchased the property on 09-05-1955 in a court-sale after the plaintiff's purchase of the suit property on 07-07-1954.

3. On these facts the learned Munsiff, Basirhat, dismissed the suit holding inter alia that the purchase of the property by the plaintiff in pursuance of a compromise decree was a private transfer of the property and is hit by Section 64 of the Code of Civil Procedure (hereinafter

referred to as the Code). On an appeal the learned Additional District Judge, Basirhat, upheld the said view of the trial Court and dismissed the appeal.

4. On a second appeal Counsel for the appellant contended that there was no dispute that the agreement for sale between the plaintiff and Dud Ali Mollah was entered into prior to the attachment of the suit property in the Execution Case No. 17 of 1954. The purchase of the suit property by the plaintiff on 07-07-1954 was in pursuance of the decree in the suit filed by the plaintiff for the specific performance of the agreement. The plaintiff therefore had a right over the suit property before the attachment and such right could not be affected by the attachment under Order 38, Rule 10 of the Code. It was further submitted that in any event a compromise decree is nonetheless a decree of the court and a transfer made pursuant to such a decree cannot be considered to be a private transfer so as to come within the mischief of Section 64 of the Code.

5. The question that arises for decision in this appeal depends upon the application of Section 64 read with Order 38, Rule 10 of the Code. Under Section 64 a private transfer of property is void as against all claims enforceable under the attachment. The object of the section is to prevent fraud on decree-holder and to secure intact the rights of the attaching creditors against the attached property by prohibiting private alienation pending attachment. Order 38, Rule 10 provides that attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit. If therefore a person has a right over a property before its attachment and he is not impleaded in the suit, that right cannot be affected by the attachment. The dispute in the present case turns upon the question as to whether an attachment before judgment will prevail over the contractual obligation created by a previous agreement of sale. In the case of *Madan M. Dey v. Rebati Mohan Poddar*¹, Woodroffe, J., speaking for the court observed that a creditor can only attach the right, title and interest of the debtor at the date of the attachment and that he has no ground for complaining if prior to his attachment the debtor has created an obligation against him touching the property. If the creditors are able to brush aside every obligation which may have been binding on the debtor prior to the date when the attachment was made, this would place them in a better position than the debtor whose property was attached. The plaintiffs in that case attached the disputed property before judgment and purchased it at an execution sale. Before the attachment by the plaintiffs the debtor had executed an agreement of sale in respect of the same property in favor of the defendant which was followed by a suit for specific performance. In pursuance of the decree in this suit the Court, before the date of the execution sale, executed a kobala conveying the property to the defendant who also obtained possession before the said sale. It was held that the provision in Section 64 of the Code was for the protection of a creditor only against transactions subsequent to the attachment and the defendant's purchase must prevail. It was further held that there was no reason to hold that the provision in Order 38, Rule 10 is limited to rights in rem. The defendant had a right to have the contract to sell specifically performed and that right was not affected by the attachment under Order 38, Rule 10 of the Code.

6. The Counsel for the respondent relied upon a subsequent Division Bench decision of this Court in the case of *Tarak Nath Mukherji v. Sanat Kumar Mukherji*², which according to the learned Counsel has overruled the earlier decision referred to. The lower appellate court also had relied upon that decision in holding that an agreement to sell the property could not prevail over the subsequent attachment whether before or after the agreement. In that case the contract to sell took place on 8th July, 1921 in favor of the plaintiff under which he paid the greater part of the prices as earnest money. The property was attached by three creditors in their suits in August and September, 1921; in

¹21 Cal WN 158 : AIR 1916 Cal 927

²33 Cal WN 805 : AIR 1929 Cal 494

November, 1921, it was sold to the plaintiff who paid the balance of the purchase money. In execution of the attaching creditors' decree the plaintiff objected unsuccessfully and he, therefore, filed suit for declaration that the property was not liable to be sold. The lower court had held that the title of the plaintiff to the property would be confirmed; but he should pay certain sum to the defendant which would be a charge on the property. That order was confirmed by the High Court. But the two learned Judges based their decisions on different grounds. Cuming J. took the view that as the contract did not create a charge on the property, the attaching creditors have the right to bring it to sale in execution in spite of the previous sale to the purchaser, who may enforce his right of specific performance against the auction purchaser under Section 40 of the Transfer of Property Act. According to the learned Judge no charge or interest is created by such obligation and hence it cannot prevail against the attachment. The learned Judge distinguished the earlier Division Bench decision in the case of 21 Cal WN 158 : AIR 1916 Calcutta 927 (supra) on the ground that it did not proceed on any principle of law but natural justice. Pearson, J., the other learned Judge was of the view that the previous decision in 21 Cal WN 158 : AIR 1916 Calcutta 927 was not based merely on the principle of natural justice but on a consideration of the scope and effect of Section 64 of the Code coupled with Order 38, Rule 10. He was however of the view that the attachment affected the right of the vendor in the property, at any rate, to the extent of any balance then receivable, under the agreement and that the attaching creditor was entitled to have it applied, in the event which happened, towards the payment of his debt. On that ground he agreed with the order made by Cuming, J., that the plaintiff was liable to pay to the defendants the balance recoverable at the date of the attachment.

7. On an analysis of the facts and the decision in the case of 33 Cal WN 805 : AIR 1929 Calcutta 494, I am of the view that that decision is no authority for the proposition that attachment before judgment prevails over the rights arising from a prior contract of sale. The same view has been taken in the case of *Rango Ramchandra Kulkarni v. Gurulingappa Chinnappa Muthal*³, Both the cases referred to earlier were considered in the Bombay decision. Broomfield, J., analysing the decision in 33 Cal WN 805 : AIR 1929 Calcutta 494 did not find it easy to follow the judgment delivered in that case and was of the view that when the facts in that case were looked at the court did not lay down any such proposition. Divatia, J., the other learned Judge also was of the view that it was difficult to extract any general principle from either of the two judgments in that

case.

8. It is true that a contract for sale of immovable property under Section 54 of the Transfer of Property Act does not, of itself, create any interest in or charge on such property. Such a contract creates only a personal obligation the fiduciary character of which is recognised in Section 3 of the Specific Relief Act and in Section 91 of the Trust Act. A contract for sale, therefore, does not create an interest in land but creates a personal obligation of a fiduciary character which can be enforced by a suit for specific performance not only against the vendor but also against a volunteer and a purchaser for consideration with notice. If the promisor sells and gifts the property and hands over its possession to another with notice of the contract, the promisee can enforce it against that other person also under Section 27 of the Specific Relief Act as also Section 40 of the Transfer of Property Act. It is true that the right of the promisee is a right in personem and not in rem. But it is an obligation annexed to the ownership of immovable property

³ILR 1941 Bom 290 : AIR 1941 Bom 198

and is in the nature of a trust under Section 91 of the Indian Trust Act. In my view such a right comes within the meaning of that term in Order 38, Rule 10 of the Code and the attachment under Section 64 is subject to that right. It is true that this right is a right in personem but there is nothing in the rule which lends support to the view that it is restricted only to right in rem. The attachment also does not create any interest in or charge upon the property. It merely keeps it in custodia legis and prevents its alienation in certain cases. The attachment may not necessarily be of the property itself but of the right, title and interest of the debtor in the property at the date of the attachment. An attaching creditor can only attach the right, title and interest of his debtor at the date of the attachment and on principle, his attachment cannot confer upon him any higher right than the judgment-debtor had at the date of the attachment. If a person, having a contract of sale in his favor, has such pre-existing right the attachment could not be binding upon him. If the promisee gets a conveyance, after the attachment, in pursuance of his contract, he takes a good title in spite of the attachment. Even if the property is sold in execution, he can enforce specific performance of his contract against the auction-purchaser as the latter acquires only right, title and interest of the judgment-debtor, which is already burdened with the contract for sale. It is true that the attachment holds good in respect of such right as the Vendor had in the property at the time of attachment, that is, the right to receive the whole or a part of the price on completion of the sale. (ILR 1941 Bom 290 : AIR 1941 Bombay 198). If therefore there is an unpaid balance of price in the hand of the purchaser, the attaching creditor can hold the purchased property in his possession liable for that amount, because by virtue of the attachment he gets the benefit of the lien.

9. In the light of the principles discussed above, the Lower Appellate Court, in my view, erred in holding that an agreement to sell immovable property entered into prior to the attachment, as in this case, could not prevail over the subsequent attachment. As the agreement for sale with Dud Ali Mollah was admittedly entered into prior to the attachment and as the property was purchased

by the plaintiff in specific performance of the agreement for sale as a result of the compromise decree, the rights of the plaintiff will prevail over the purchase of the property by the defendant in the court sale on the basis of the attachment made in Execution Case No. 17 of 1954. As the appeal succeeds on this point it is not necessary for me to decide the other question viz., whether the purchase of the property in terms of the compromise decree can be treated as a private transfer so as to come within the mischief of Section 64 of the Code.

10. The result is this appeal is allowed. The judgment and decree of the Lower Appellate Court as also of the trial Court are set aside. There will be no order as to costs.

Appeal allowed.