

PUNJAB AND HARYANA HIGH COURT

Manna Singh Allah Singh

Vs

Wasti Ram Saraf

(S Dulat, C.J. D.K. Mahajan, J.)

08.09.1959

JUDGMENT

D.K. Mahajan, J.

(1) This is a first appeal directed against the judgment and decree of Sub-Judge 1st Class, Amritsar, dated the 5th May, 1952, in a suit filed under Order 21, rule 63 of the Code of Civil Procedure.

(2) The facts giving rise to this appeal are that the property in dispute, six shops on G. T. Road, Amritsar, were sold by Manna Singh to Jodh Singh for a sum of Rs. 24,800/- under a registered deed of sale. A sum of Rs. 15,800/- was paid before the Sub-Registrar and the balance remained in the trust with Jodh Singh, and had to be paid to the vendor within two months of the registration of the deed. In execution of a money decree obtained by Wasti Ram against Jodh Singh, these six shops were attached. Objection were raised tot he attachment by Manna Singh under Order 21 Rule 58 of the Code of Civil Procedure on the 21st of March, 1951, to the effect that the property was subject of a charge of Rs. 9000/-. This application was dismissed by the executing Court on the 26th of March, 1951, on the ground that the objection had been designedly and unnecessarily delayed. The next day the auction took place and the shops were purchased by Shiv Parkash, Defendant No. 3.

(3) The present suit was filed on the 12th of April, 1951 under Order 21 rule 63 for a declaration that the plaintiff is in possession of the shops as a mortgagee and that the auction sale held on the 27th of March, 1951, in execution of Wasti Ram Defendant No. 1's decree against Jodh Singh defendant No. 2 being without reservation of mortgagee's rights is not valid and that Shiv Parkash defendant No.3, the auction-purchaser, was not entitled to take possession of the aforesaid shops without liquidating the charge on them. Defendant No. 2 the judgment-debtor, did not appear and we proceeded against ex parte. Defendants Nos. 1 and 3, the decree-holder and the auction-purchaser respectively, contested the suit. The decree-holder's defence was that the property belonged to the judgment-debtor and was not subject to any charge. It was also

pleaded that the suit did not lie in the present form. Defendant No. 3 in his defence raised the plea that the suit had not been properly stamped for the purposes of Court-fee and jurisdiction. He also denied the charge on the property and in the alternative pleaded that if there was any charge, it had been paid off. And further that if there was a subsisting charge, defendant No. 3 is not liable for the same as he is a transferee for consideration without notice of the charge and is protected. On the pleadings of the parties, the following issues were framed:--

1. Whether the suit in the present form cannot proceed ?
2. What is the proper value of the suit for purposes of Court-fee and jurisdiction ?
3. Whether the plaintiff is in possession of the property in dispute as a mortgagee ?
4. Whether defendant No. 3 is a transferee for consideration without notice and how does it affect the present suit ?
5. Relief. The trial Court dismissed the suit on the 5th of May, 1952. It held that the suit was not maintainable, that the value for purposes of jurisdiction was about Rs. 9000/-, but all the same proper Court-fee had been paid and the only effect was regarding the forum of appeal; and that defendant No. 3 was protected because he was a bona fide transferee for consideration. Dissatisfied with this decision, the plaintiff has come up in appeal to this Court.

(4) The contentions raised by Mr. Bhagirath Das, learned counsel for the appellant, are:--

1. That the trial Court has gone wrong in holding that, the suit, that the plaintiff should have filed was to enforce this charge, and that the present suit for a mere declaration does not lie;
2. that defendant No. 3 being an auction-purchaser has purchased merely the right, title and interest of the judgment-debtor in the shops in dispute, and as the shops were subject to a charge and that charge was binding on the judgment-debtor, it is also binding on the auction-purchaser, and he cannot escape liability on the plea that he is a bona fide transferee for consideration without notice of the charge; and
3. that in any case it is established on the record that defendant No. 3 had actual as well as constructive notice of the charges and is therefore bound by the same.

(5) It seems to me that there is considerable force in the first contention. The finding of the Court below that the present suit being merely for a declaration is not competent is clearly wrong and cannot be upheld. As far back as the year 1906, this question came up for decision before a Full Bench of the Madras High Court in *Kristnam Sooraya v. Patham Bee*, ILR 29 Mad 151 and it was held that:--

"..... the proviso to Section 42 of the Specific Relief Act does not operate so as to take away from a party against whom an order has been made under Secs. 280, 281 or 282 of the Code of Civil Procedure, the special right conferred by S. 283 to sue for a declaration of his title in so far as it is affected by the order which he seeks to impeach."

No doubt this decision was under the 1882 Code, but it makes no difference. The corresponding provisions under the 1908 Code, are in similar terms and while dealing with them the rule in ILR

29 Mad 151 has been followed. In this connection reference may be made to the decision in *Tulsi Das v. Shiv Dat*¹, *Anrajo Kuer v. Ramadaya Singh*², Thus the provisions of S. 42 of the Specific Relief Act have no application to a suit filed under O. 21 R. 63 of the Code of Civil Procedure.

(6) So far as the second contention is concerned, there is no force in it in view of the amendments to the Transfer of Property Act in the year 1929. It is, therefore, necessary to set out the relevant provision of the statute (Transfer of Property Act) as they now stand after the amendment:

"Section 2. In the territories to which this Act extends for the time being the enactment specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing contained shall be deemed to affect-

a. xxxxxxxxxx b. xxxxxxxxxx c. xxxxxxxxxx d. save as provided by S. 57 and Chapter IV of this Act, any transfer by operation of law, or by, or in execution of a decree or order of a Court of competent jurisdiction.

Section 5: In the following sections 'transfer of property' means an Act by which a living person conveys property, in present or in future to one or more other living persons, or to himself, or to himself and one or more other living persons and 'to transfer living property' is to perform such act. Section 100. Where immovable property of one person is by Act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions herein before contained which apply to a simple mortgage shall, so far as may be, apply to such charge. Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and save as otherwise expressly provided by any law for the time being in force no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge".

(7) A similar question came up for consideration before a Full Bench of the Allahabad High Court in *Nawal Kishore v. Municipal Board Agra*, AIR 1943 All 115, and it was held:

".....The words used in S. 100 are 'no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration' and the words 'transferred for consideration' are wide enough to include an auction sale in execution of a decree. No doubt, the Preamble of the Transfer of Property Act states that the Act is meant to define and amend laws relating to the transfer of property by Act of parties and S. 5, T. P. Act, which defines the expression 'transfer of property' contemplates also a transfer by Act of parties and the language used in S. 100 as 'property transferred for consideration' also suggests that the basis of the transaction is a contract of which consideration is the essential element, but S. 2(d), T. P. Act lays down:

"But nothing herein contained shall be deemed to affect(d) save as provided by S. 57 and Chap. 4 of this Act any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction".

And Chapter 4 deals with mortgages and charges and S. 100 which specifically provides for charges is included in it. Section 2, therefore, provides that the Transfer of Property Act may affect a transfer by operation of law or by, or in execution, of a decree or order of a Court in matters relating to S. 57 and Chapter 4 of the Act, and it is a legitimate argument that in Chapter 4 and also in S. 100 which is included in Chapter 4 the expression 'transferred' is used in a wider sense and includes both a transfer by Act of parties and a transfer by operation of law or by or in execution of a decree".

(8) We are in respectful agreement with these observation. To the similar effect is the decision of the Patna High Court reported as *Rajkishore Lall v. Begum Sultan Jehan*, AIR 1953 Pat 58. No authority to the contrary has been cited at the bar nor we have been able to discover one. Thus the second contention raised fails.

(9) It cannot be disputed that if part of the purchase price remains unpaid, it is a charge on the property sold (Section 55 of the Transfer of Property Act). It also cannot be disputed that unlike a mortgage a charge is not attached to the property and its transfer is not subject to it unless the transferee has notice of the charge.

(10) Now the last contention remains for consideration. It is conceded that the plaintiff has not been able to establish actual notice of the charge to the transferee. The learned counsel restricted his argument to constructive notice. According to him, the transferee would be deemed to have notice of the charge from the fact that (a) plaintiff was in possession of the shops and not the judgment-debtor; and (b) that in the sale deed in favour of the judgment-debtor it is stated that part of the sale price (Rs. 9000/-) was unpaid, for under the law registration of a document is notice to the entire world of the contents of the same. It is not disputed that the property was in actual possession of a tenant, Chaman Lal, and as such it cannot be said to be in possession of the plaintiff. In such circumstances, the intending purchaser is not required to ascertain what the tenant's rights are and also who is his lessor and what is that lessor's title. In this connection reference may be made to *G. Sitayya v. G. Kotayya*³, As regards the recital in the sale deed about Rs. 9,000/- which had been left in trust with Jodh singh for payment to the plaintiff within a period of two months, the position might have been different if the auction sale had taken place within those two months. As a matter of fact the auction sale took place more than four years after the execution of the sale deed by the plaintiff. It cannot, therefore, be assumed that any reasonable person even if he had read the term in the sale deed could have been put on an enquiry that the sum of Rs. 9,000/- which by no means is a small sum was still unpaid.

(11) The definition of 'notice; contained in S. 3 of the Transfer of Property Act is-

".....a person is said to have 'notice' of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence he would have known it".

What therefore has to be seen is whether in the circumstances of this case, can it be said that there was any willful abstention from an inquiry or search, which ought to have been made or that there was gross negligence on the part of the auction purchaser, which prevented him from the knowledge that a sum of Rs. 9,000/- was still due and was a charge on the property, which he was purchasing at the auction ? In my view this cannot be said. No reasonable man could ever have imagined that a huge sum of money, which was payable within a period of more than four years. On the facts and circumstances disclosed on the record it seems that the plaintiff has been set up by the judgment-debtor in an attempt to defeat the decree-holder. The sale proclamation was drawn up after notice to the judgment-debtor. If there was a charge on the property, the judgment-debtor would have pointed out the same. This was not done with the result that the property was stated to be free from all encumbrances in the proclamation of sale and the notice of auction. The property remained under attachment for a considerable period and during all this period no steps were taken by the plaintiff to intimate his charge. It was five days before the auction that he came to Court and filed his objections to the attachment under O. 21 R. 58 of the Code of Civil Procedure on 21-3-1951, stating that the property was subject to a charge in his favour. These objections were rejected on 26-3-1951. The order of the Court rejecting the objections is in the following terms:

"The objections have been designedly and unnecessarily delayed. The sale will take place tomorrow. The objections are summarily dismissed". Therefore he knew on the 26th at the time when his application was dismissed that the sale was to take place the next day. He not only disappeared from the scene altogether but did not at all approach the Official Receiver or at the time of the sale proclaim by handbills or otherwise that the property that was being sold was subject to his charge. All he did was to file the present suit on 12-4-1951. Even in this suit no attempt has been made to prove that in fact the sum of Rs. 9,000/- is still due to him. He has not even cared to produce the judgment-debtor in evidence to support his claim that Rs. 9,000/- was still due from him.

(12) After considering all the facts and circumstances of the case, I have come to the conclusion that the auction purchaser had no notice of the alleged charge. Therefore, the third contention of Mr. Bhagirath Dass has also no substance.

(13) For the reasons given above, this appeal fails and is dismissed but without any order as to costs.

S.S. Dulat, J.

(14) I agree.

(15) Appeal dismissed.

Cases Referred.

1ILR 9 Lah 167: (AIR 1927 Lah 631) Mt

2ILR 21 Pat 300: (AIR 1942 Pat 406)

3AIR 1932 Mad 71