TRAVENCORE COCHIN HIGH COURT

Kochuponchi Varughese

Vs

Ouseph Lonan

A.S. No. 146 of 1124

(Koshi and Govinda Pillai, JJ.)

13.11.1951

JUDGMENT

Govinda Pillai, J.

1. The plaintiff is the appellant. The plaint properties originally belonged to one Variathu. He had executed a Will in 1077 bequeathing all his properties to his daughter Anna Meenka and her male issues, one of whom is the 4th defendant. The 5th defendant is the son of another son of hers by name Ouseph who died in 1091. Anna Meenka and Ouseph's wife had executed a mortgage in 1091 to one Yohannan Kathanar for the plaint properties and took back the same on lease. Yohannan Kathanar had filed O. S. 979/1100 in the Munsiff's Court of Alleppey for arrears of pattern and for recovery of possession of the properties. The same mortgagors had also hypothecated the properties to one Ummer Kutti who obtained a decree in O. S. 1628/1098 on the same. While so, the 4th defendant filed O. S. 1232/1102 in the Alleppey Munsiff's Court for a declaration of his ¼th share and for recovery of the same after division by metes and bounds after declaring that the decrees in O. S. 979/1100 and O. S. 1628/1098 and the Otti deed of 1091 to Yohannan Kathanar were not binding on him or his share in the property. The 5th defendant had also filed a similar suit O. S. 1522/1105 for the identical reliefs. These suits were tried together. Subsequently they were compromised on 32-12-1108 by which each of defendants 4 and 5 agreed to pay Rs. 600 to Ummerkutty to get release of his rights over the properties. The Otti deed to Yohannan Kathanar and the decree obtained by his children were agreed to be set aside. While the partition suit was pending, Yohannan Kathanar's children executed a sub-mortgage of their right to the 1st defendant's father, and on the basis of the same he obtained a decree in O. S. 46/1108. Before the partition suit was compromised the 4th defendant had executed a gift deed Ext. A on 10-11-1102 to his wife and 3rd defendant and her children. By this they were allowed to continue the suit and recover possession of his share in the properties in execution. The donees were directed to maintain the 4th defendant for his life. There was a further provision that in case he was not maintained properly he would be entitled to one-half of the income from the properties that would go to his share. With the compromise, the properties were divided and the plaint and other properties were allotted to the share of the 4th defendant.
Defendants 3 and 4, on 24-11-1117 agreed to sell the plaint properties to the plaintiff and executed Ext. B agreement on receipt of an advance of Rs. 50/-. The properties were

subsequently sold to him on 24-5-1118. Ext. C is that sale deed. The properties were put in his possession from the date of Ext. B. While he was thus in possession, a receiver had been appointed in O. S. 46 of 1108 mentioned above. The 2nd defendant was the receiver and he obtained possession of the properties on 29-2-1120. The present suit was filed for declaration of the plaintiff's right to the plaint properties and for recovery of possession of the same with mesne profit at the rate of Rs. 225 a year.

2. The 5th defendant was the main contesting defendant. It was not mentioned in the plaint why he was impleaded in the case. But he contended that at the time of the compromise the 4th defendant agreed to pay him Rs. 100/- to equalise the shares and executed an agreement in his favour. Since this amount was not paid he had filed the suit O. S. 620/1112 and obtained a decree thereon. In execution of this decree he had attached the plaint properties on 30-5-1118 and sold them in court auction on 16-12-1118. He himself purchased the same and obtained delivery of possession on 22-11-1120. Ext. X is copy of that delivery kychit. He therefore contended that he was in rightful possession and that he was not to be evicted. He also stated that Ext. A gift deed in favour of the 3rd defendant and her children by the 4th defendant was without any consideration, that it was vitiated by lis pendens, that on the date of the gift, the 4th defendant was not entitled to the plaint properties, and that the gift deed was also not intended to take effect. He had no objection to the decree in O. S. 46/1108 being set aside. According to him the mesne profits from the plaint properties would not be more than Rs. 60 a year.

3. The lower court found that though Ext. A was executed during the pendency of O. S. 1232/1102 it did not affect the plaintiff's case in any way, that by Ext. A the 4th defendant was not divested of the ownership of the plaint properties, that by virtue of the agreement between defendants 4 and 5, the 5th defendant became entitled to get Rs. 100 from the 4th defendant by way of equalization of the shares, that the decree obtained by the 5th defendant against the 4th defendant in O. S. 626/1112 was valid, that the attachment by the 5th defendant of the plaint properties was also valid and binding on the plaint properties, that the plaintiff was not entitled to question the same, and that the decree and execution proceedings in O. S. 46/1108 were liable to be set aside. Since the decree and execution proceedings in O. S. 626/1112 obtained by the 5th defendant were found binding on the plaint properties, the suit was dismissed with costs to the 5th defendant.

4. Though there were no allegations in the plaint attacking the decree obtained by the 5th defendant in O. S. 626/1112 it would appear that the validity of the same and the execution proceedings had been disputed by the plaintiff. Issues 1 and 2 relating to the claim of Rs. 100 advanced by the 5th defendant and the attachment, and execution proceedings in O. S. 626/ 1112 would show the same. It would have been well if the plaintiff had definitely put forward his case in the pleadings instead of attempting to develop his case as the trial went on. At any rate, the 5th defendant could not be held to be prejudiced in any way because of the two pertinent issues 1 and 2 raised in the case. So we are inclined to go into the merits of the case relating to the contentions advanced by the several parties.

5. The dispute is now only between the plaintiff and the 5th defendant. The 5th defendant is now in possession of the plaint properties. The plaintiff had stated that while he was in possession of the plaint properties, the 2nd defendant who was appointed as the receiver in O. S. 46/1108 had divested him of his possession in 1120. That was admitted by the 5th defendant in paragraph 6 of his written statement. So it was clear that the plaintiff was in possession of the plaint properties

pursuant to the arrangement entered into between him and defendants 3 and 4. Ext. H is the agreement for sale executed by defendants 3 and 4 in favour of the plaintiff. This agreement, though mentioned in the plaint, was not denied by the 5th defendant in his written statement. The agreement shows that the plaintiff was put in possession of the properties on the date of Ext. B that is on 24-11-1117. What the 5th defendant had obtained was only a simple money decree for Rs. 100 and future interest from the date of the suit. He had effected an attachment of the plaint properties in execution of that decree only on 20-5-1118, that is nearly six months after the agreement for sale, but four days before the actual execution of the sale deed Ext. C. The plaintiff's case was that the 5th defendant was not entitled to proceed against the properties for a debt due from the 4th defendant as he had no alienable interest in the properties on the date of attachment because he had gifted away the properties to his wife and children in 1102 under Ext. A. The 5th defendant would say that this gift deed had not taken effect, and he had produced at the time of argument, two documents, Exts. XI and XII to show that the 4th defendant had executed a sale deed in 1110 for one of the properties obtained for his share. On the other hand, the plaintiff had produced Exts. F, G and J to show that the 3rd defendant was exercising the right of ownership after the date of Ext. A over some of the properties obtained under the gift deed. Whatever might be the real position, it would be seen that the 4th defendant had retained some right over the properties for his lifetime for the purpose of his maintenance. It cannot therefore be said that he had no manner of right over these properties. Being so, it would only be proper if without causing any undue hardship to any of the parties, the equities between them are settled. The plaint properties were sold by defendants 3 and 4 to the plaintiff for Rs. 668. It had been found by the commissioner sent from court that the annual income from these properties would be Rs. 148 and odd. The lower court had found that the mesne profits would be this amount, and the 5th defendant had not questioned that finding. The amount due to the 5th defendant under the decree in O. S. 626/1112 was only Indian Rs. 100 and interest from the date of suit i.e., from 29-6-1112. Ext. VIII is copy of the plaint in that case. Since it was an 'ex parte' decree it may be presumed that the future interest claimed by the 5th defendant in the plaint was also allowed by the court. Copy of that decree had not been produced in the case. At any rate, it could be seen that on the date of the court sale, the amount due to the 5th defendant would not have been anything more than Rs. 150 and for this he had knocked away valuable properties. It was also seen that in 1117 the plaintiff had obtained an agreement for sale and also secured possession of the plaint properties. He could use that as a shield against any person who wanted to secure possession from him by a title completed subsequently. On the date of the attachment what he was liable to pay was only the balance of consideration agreed to be paid for the sale. So what the 5th defendant could legitimately claim out of that sale consideration was only the amount that would satisfy the decree. For this purpose we assume that the decree obtained by the 5th defendant was valid.

Though this position was hotly contested by the learned Advocate for the appellant we do not go into that question further, as the plaintiff had not by specific pleadings questioned its validity mentioning the grounds of attack. As mentioned already, the 5th defendant had not produced a copy of the decree in O. S. 626/1112 or the sale sannad which he had obtained in execution of that decree. The sale itself was in 1115 so that the money due to him by way of interest at 6 per cent. on the principal sum would not have been more than Rs. 50/-. We would therefore allow him Indian Rs. 150/- in satisfaction of his claim. The plaintiff is liable to pay the same. The 5th defendant had secured possession of the properties and he is allowed to retain the same till the said sum of Indian Rs. 150 is paid to him by the plaintiff. Till that amount is deposited the plaintiff is not allowed mesne profits in the properties. Thus we set aside the decree of the lower

court and pass a decree allowing the plaintiff to recover possession of the plaint properties from the 5th defendant on payment of Indian Rs. 150/-. The plaintiff will not get any mesne profits till he deposits the said amount and serve notice of the same on the 5th defendant. On the failure of the 5th defendant to surrender possession of the properties after the date of service of the notice of deposit the plaintiff will get mesne profits at the rate of Indian Rupees One hundred and forty eight - twelve 'chuckrams' (148/- 12 chs.) a year from the 5th defendant. The pleadings of the plaintiff were defective, and he does not also get an unconditional decree. The 5th defendant has also set up unnecessary and vexatious contentions. So the proper order will be to direct the parties to suffer their costs throughout. The appeal is thus allowed as indicated above.

Koshi, J.

5. I agree, but at the same time think it proper to add a few words.

6. With great insistence learned counsel for the 5th defendant respondent commended for our acceptance the view that as an agreement to sell immovable property does not create any interest or charge on the property it cannot prevail over a subsequent attachment The decision of Cuming, J., in '*Tarak Nath V. Sanat Kumar*[1]*',* was cited as authority. To put it mildly that view is a much criticised one. Pearson, J., who sat with Cuming, J., in the decision of that case did not share his learned colleague's view and was inclined to agree with the earlier decision Woodroffs and Richardson, JJ., gave in '*Madan Mohan V. Rebati Mohan*[2]*',* The learned Judge said that the attachment holds good only as against the then unpaid balance of the purchase money under the prior agreement to sell. That view it is that my learned brother has adopted in the decision of this appeal.

7. The law to be applied when competing title holders as we have in this case are brought face to face is clearly and succinctly set out by Wadsworth, J., in the decision reported in '*Athinarayana Konar V. Subramania Ayyar*[3]*',* and I think it proper to extract a portion of that judgment here. The facts of that case closely resemble the facts in this case, the only difference being that there the suit was brought by the court auction-purchaser. The attachment in that case was effected after the agreement to sell was made and the court sale took place after the judgment-debtor had sold the

[1] AIR 1929 Cal 494 [3] AIR 1942 Mad 67
[2]21 Cal W N 158

property to the defendants in due performance of the agreement. Two years after the court sale the plaintiff got delivery through court and thereafter the defendants were alleged to have entered upon the land. The plaintiff then brought the suit that gave rise to that appeal for recovery of possession. After setting out these facts the learned Judge proceeded to state as follows at page 68 of the report :

> "Now there is a line of decisions of this court which make it quite clear that though a contract to sell does not, having regard to the terms of Section 54, T. P. Act create any interest in or charge on the property, it does not give rise to an obligation which limits the right of the judgment-debtor and that the attachment of the right, title and interest of the judgment-debtor is subject to any such limitation by which the judgment-debtor was bound. The cases which have been quoted before me on this point are : '*Bapineedu V. G.*

Venkayya'[4], *'Venkata Reddi V. Yellappa Chetty'*[5], *'Veeraraghavayya V. Kamala Devi*[6]*'*, *'Veerappa Thevar V. Venkatarama Aiyar'*[7], *'Diravyam Pillai V. Veeranan Ambalam*[8]*',* and there is a decision of the Privy Council which throws light on the same subject reported in *Nur Mahomed Peerbhoy V. Dinshaw Hormasji*[9]*',* An attempt has been made to distinguish these decisions on the ground that they are cases in which the prospective purchaser has under his contract either paid money or got possession, but it does not seem to me that this is the basis of any of these decisions. The matter has been well put by Varadacharier, J., at page 831 of the decision in 1939-2 Mad LJ 822 at page 828. The learned Judge says that :

'The question is not whether any interest has passed under the contract to sell. The attaching decree-holder attaches not the physical property but only the rights of the judgment-debtor in the property.'

As explained in the decisions and recognized in Section 40, T. P. Act, the right of the judgment-debtor in the property is on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor....." Wadsworth, J., was sitting alone to decide that case but that is the latest case I was able to come across bearing on the question. Most of the earlier decisions referred to there are Division Bench Rulings.

8. Varadachariar, J., from whose judgment Wadsworth, J., quoted a passage has discussed the question more elaborately and it would be very instructive to quote here a few passages from that decision. Gentle, J., as he then was, concurred in the judgment Varadacharier, J., gave. The relevant passages occur at pages 706 and 707 of '*Diravyam Pillai V. Veeranan Ambalan*[10]*',* and they read as follows :

"All that Section 64 of the Code (Civil Procedure Code) provides is that any private transfer by the judgment-debtor of the property attached shall be void

[4]21 Mad L J 82 : 7 Ind Cas 795
[5] 5 Mad L W 234 : 38 Ind Cas 107
[8]1939-2 Mad L J 822 : AIR 1939 Mad 702
[9]45 Mad L J 770 : AIR 1922 P C 393
[6]68 Mad Lj 67 : AIR 1935 Mad 193
[7]50 Mad 1 : AIR 1935 Mad 872
[10] AIR 1939 Mad 702

as against all claims enforceable under the attachment. It will not be accurate to read Section 64 as putting an end to the power of sale, because as between the transferor and the transferee, the alienation will undoubtedly be operative. If the attaching creditor is paid off or for any reason the attachment ceases to subsist, the alienee's title will be unassailable. The only effect of Section 64 is that such transfer shall not prejudice the rights of the attaching creditor.

If the above is the true position, the question arises whether when a sale is made in pursuance of a contract entered into prior to the attachment, such conveyance is one contrary to the terms of Section 64 at all. We cannot agree with Mr. Krishnanswami Iyer that the uniform course of decisions on this point referred to already is in any way opposed to the recent decisions of the Privy Council as to the effect of Section 54 T. P. Act. The argument based on Section 54 has

been considered in many of the cases referred to. The question is not whether any interest has passed under the contract to sell. An attaching decree holder attaches not the physical property. As explained in the decisions and recognised in Section 40, T. P. Act, the right of the judgment-debtor in the property is on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that it remained the absolute property of the judgment-debtor. Nor can it be said that the sale by the contracting parties executed in pursuance of a preexisting contract to sell, prejudices the attaching creditor, because the sale is merely the fulfilment of the obligation to which the judgment-debtor was already subject. The utmost that the attaching decree-holder will be entitled to, in such circumstances is the payment of the balance of the purchase money if anything remained due on the date of the attachment. Mr. Krishnaswami Iyer relied on the observation of Sir D. F. Mulla in the notes to Section 40, T. P. Act to the effect that the attaching decree-holder will not be bound by a conveyance even in pursuance of a pre-existing contract to sell but the learned author draws a distinction between a conveyance voluntarily executed by the judgment-debtor in pursuance of pre-existing contract and a conveyance executed by him under an order of court in pursuance of a pre-existing contract. In the latter case, the author seems to think that the attaching creditor cannot object to the conveyance. If this distinction is well founded, it is sufficient to support the decision of the lower court in this case because the sale deed was executed in this case in pursuance of an order of court. But we are inclined to agree with Mr. Krishnaswami Iyer that there really ought to be no distinction between the two classes of cases, because in both cases, the conveyance is really not voluntary but is only the fulfilment of an obligation already incurred; only we would also hold that such a conveyance is not in reality contrary to the attachment within the meaning of Section 54, Civil Procedure Code. Reliance was placed by the learned counsel for the appellants on some observations of Cuming, J., in '*Tarak Nath V. Sanat Kumar*[11]*',* In one part of the judgment, the learned Judge seems to grant that the vendee will have a right to claim specific performance as against the court auction purchaser. If that be the position, it is difficult to see the justification for his differing from the other decisions referred to already including the decision of the Calcutta High Court in '*Madan Mohan V. Rebati Mohan (Supra)',* With all respect, we prefer to adopt the view of Pearson, J., the other learned Judge who took part in '*Tarak Nath V. Sanat Kumar', 57 Cal 274 : AIR 1929 Calcutta 494(Supra)* and that is in accordance with

[11]57 Cal 274 : AIR 1929 Cal 494

the weight of authority as we have already observed. Our attention was drawn by Mr. Krishnaswamy Iyer to the decision of the Judicial Committee in '*Nur Mahomed Peerbhoy V. Dinshaw Hormasji', 45 Mad L J 770 : AIR 1922 P C 393(supra).* We do not find anything in that judgment to help the appellants. Their Lordships merely leave the question open and they have not given any indication that may be said even to throw doubt on the correctness of the decisions of the several High Courts on the point."

The view Cuming, J., expressed in AIR 1929 Calcutta 494 was dissented from in three other cases. Two of them are among the cases referred to by Wadsworth, J., See '*Veeraraghavayya V. Kamala Devi', AIR 1935 Madras 193(supra)* and *Veeeappa Thevar V. Venkatarama Aiyar', AIR 1935 Madras 872(Supra).* The former case was decided by Venkatasubba Rao, J. and the latter by Beasley, C.J. and Cornish, J. The third case in '*Basappa Chambasappa V. Hanmappa Ramappa', AIR 1939 Bombay 492(Supra)* and the decision was given by Beaumont, C.J. The relevant passage occurs at p. 493 and it is in these terms :

> "Therefore, I think, there is a good deal of force in the contention of the present appellant

that the plaintiff did get a good title. Mr. Murdeswar relies on 57 Cal 274 : AIR 1.929 Cal 494 but that case is opposed to an earlier decision of the Calcutta High Court in 23 Cal LJ 115 : 21 Cal WN 158 in which the Court held that a conveyance of a property, executed after its attachment before judgment by a creditor, in pursuance of a contract dated before the attachment should prevail over the attachment. I think that decision is right, and I prefer it to the later decision of the Calcutta High Court, which, I must confess, I have some difficulty in understanding."

9. Regard being had to the large preponderance of judicial opinion opposed to the view Cuming, J., took in the case referred to and the innate logic and sense of justice behind that opposite view, we have with respect chosen to follow that.

10. The respondent's learned counsel also urged a further point that the plaintiff should have sought his remedy in O. S. 626 of 1112 when possession was given to his client pursuant to the sale certificate granted to him. We cannot subscribe to that view. No doubt he could have resorted to the summary remedy provided by the Civil Procedure Code but he was not bound to do it. Presumably the argument was that the appellant was a representative of defendant 4, the judgment-debtor in O. S. 626/1112. A similar argument was advanced and repelled in '*Ghusaram V. Parashram', AIR 1936 Nagpur 163(supra)*. There it was held that where subsequent to a contract to sell certain property, that property was attached by a decree-holder of the proposed vendor and the sale in pursuance of the contract took place afterwards, the vendee was not a representative of the judgment-debtor (the vendor) within the meaning of Section 47 and that as such a suit by the vendee for a declaration that the property was not liable to attachment was not barred by Section 47. We respectfully agree with this view; in other words this contention of the respondent has also to be repelled.

11. With these observations I agree with the judgment delivered by my learned brother and in the decree proposed by him.
Appeal allowed.