
(1972) 12 AHC CK 0024

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 4209 of 1970

Banta Singh

APPELLANT

Vs

Dy. Director of Consolidation and Others

RESPONDENT

Date of Decision : 22-12-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 10

Citation : AIR 1973 All 455

Hon'ble Judges : R.B. Misra, J

Bench : Single Bench

Advocate : Mohd. Yusuf and B.D. Tripathi, for the Appellant; Kamta Natha, for the Respondent

Final Decision : Dismissed

Judgement

R.B. Misra, J.—This is a petition under Article 226 of the Constitution. It challenges the orders of the Deputy Director of Consolidation dated 18th July, 1970 and that of the Settlement Officer (Consolidation) dated 3rd July. 1963.

2. The facts leading up to this petition lie in a narrow compass.

3. The disputed plot was, admittedly, the bhumidhari land of Gurbachan Singh. On 5th September. 1961, he entered into an agreement to transfer the said plot to Sita Ram and others, respondents Nos. 4 to 10. Sardar Banta Singh, the petitioner filed a suit No. 49 of 1961 in the court of the Civil Judge and during the pendency of the suit, he obtained an order of attachment before judgment on 23rd November. 1961. A Commissioner was appointed the same day to attach the disputed plot who complied with the order the same day.

4. It appears that the very next day, Gur Bachan Singh executed a sale deed in favour of respondents Nos. 4 to 10 pursuant to the agreement dated 5th September. 1961. Eventually the petitioner's suit was decreed against Gurbachan Singh on 23rd September. 1963. In execution of the decree, the disputed plot was put up for auction on 16th August. 1964. The petitioner being

the highest bidder, his bid was accepted and he himself purchased the plot at the auction and obtained formal possession on 31st May. 1965. In the meantime the vendees from Gurbachan Singh Sita Ram and others, got their names mutated pursuant to the sale deed in their favour.

5. When the village was brought under consolidation operations, the petitioner filed an objection u/s 9-A of the U. P. Consolidation of Holdings Act claiming to be the tenure-holder of the disputed plot on the basis of auction sale. He prayed for the expunction of the names of Sita Ram and others, respondents Nos. 4 to 10. His claim was resisted by respondents Nos. 4 to 10 (sic) on the ground, inter alia that the sale in favour of respondents Nos. 4 to 10, pursuant to the agreement of sale, was void, as the sale took place after the attachment of the property by the Court u/s 64. C.P.C.

6. The Consolidation Officer held that the sale in favour of Sita Ram and others, after the attachment of the property before judgment was invalid and no title passed to them. Accordingly, he allowed the objection of the petitioner and directed for the expunction of the names of the vendees, Sita Ram and, others. On appeal, the Settlement Officer (Consolidation) reversed the order of the Consolidation Officer and held that the sale in favour of Sita Ram and others by Gurbachan Singh being pursuant to an agreement entered into on a day prior to the date of attachment before judgment was a valid sale. The petitioner, feeling aggrieved, went up in revision against the order of the Settlement Officer (Consolidation), but the Deputy Director of Consolidation confirmed the order of the Settlement Officer (Consolidation). The petitioner has now come to this Court.

7. The only question for consideration in this petition is whether the sale deed executed by Gurbachan Singh pursuant to an agreement of sale dated 5th September. 1961 prior to the date of attachment before judgment was or was not a valid one.

8. Sri B.D. Tripathi, appearing for the petitioner, contended that the sale of the disputed plot in favour of respondents Nos. 4 to 10 after the attachment of the property was void ab initio and did not confer any right on respondents Nos. 4 to 10 and the Deputy Director of Consolidation committed a manifest error in holding to the contrary. In support of his contention, he relied upon Dular Singh Vs. Ram Chander and Another, . It was held in that case that the only effect of the attachment before judgment is to prevent the judgment-debtor from making a transfer of the attached property during the continuance of the attachment so that the benefit of attachment may be available to him when he seeks to enforce his decree which might subsequently be passed. The order of attachment does not create a charge in his favour and therefore as soon as the attachment ceases the plaintiff loses all rights to enforce any claim under it. This case is not of much help on the point involved in the case. As stated earlier, the question for consideration is what would be the effect of attachment before judgment on the sale executed pursuant to an agreement entered into much prior to the attachment before judgment.

9. Next reliance was placed on *Jethalal Nanshah Modi Vs. Bachu*, In that case, a Division Bench of the Bombay High Court held:

"Section 64 (of the Civil Procedure Code) affects only private sales after attachment and does not cover the enforced execution of a conveyance in obedience to a decree of a Court."

This case also goes against the petitioner.

10. Reliance was also placed on AIR 1938 230 (Privy Council) In that case, it was held by the Privy Council that the main purpose of attachment is to prevent the transfer or charging of the property attached by the judgment-debtor. There is no dispute about the proposition of law laid down in that case. But I am concerned with slightly a different question in this case.

11. *Sri Banarsi Dass*, appearing for the contesting respondents, on the other hand, strongly relied upon the provisions of Order 38. Rule 10. C.P.C. It reads:

"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 defendant from applying for the sale of the property under attachment in execution of such decree."

12. No doubt, the agreement to sell is not tantamount to a transfer of the property, itself. The only effect of the agreement is that the contracting party can enforce the terms of the agreement and obtain a transfer. But unless the property is transferred by a deed of conveyance as required by law, he gets no rights in the property, but, all the same, he has the right to enforce the contract. Order 38. Rule 10. C.P.C. is wide enough to include even such a right and, therefore the transfer made in pursuance of an agreement entered into prior to the attachment of the property will not be defeated on the ground that the transfer was made after the attachment and Order 38 Rule 10, C.P.C. will come to the rescue of the transferees. This view finds support from uniform decisions of various High Courts.

13. In *Yeshvant Shankar Dunakhe Vs. Pyaraji Nurji Tamboli*, it was held that:--

"The principle laid down in Order 38. Rule 10 is not limited to attachments before judgment. It applies to all attachments whether before judgment or in course of execution. Where the purchase in pursuance of a decree for specific performance is subsequent to the attachment but the agreement in pursuance of which the decree has been passed was prior to the attachment the purchase prevails against the attachment."

14. In *Radha Kant Jha Vs. Ramanup Singh and Others*, , a Division Bench of the Patna High Court took the view that:

"An attachment before judgment cannot prevail over a sale deed executed in respect of the attached property before the order of attachment is made even though the sale deed is registered after the attachment. If in such, a case the

person attaching the property purchases it subsequently in execution of his decree, he cannot get a valid title to the property as against the prior private purchaser."

15. In *Veerappa Thevar and Others Vs. C.S. Venkatrama Ayyar*, a Division Bench of the Madras High Court laid down the following proposition of law:

"An agreement to sell creates an obligation to convey the property and a later attachment will not override the conveyance made in performance of the obligation. The attachment holds good in respect of such a right as the vendor had in the property at the time of attachment."

16. In *Kochuponchi Varughese v. Ouseph Lonan*. AIR 1952 Trav Co 467, a Division Bench held:

"Though an agreement to sell immovable property does not create any interest or charge on the property it can prevail over a subsequent attachment. The attachment holds good only as against the then unpaid balance of the purchase money under the prior agreement to sell."

17. The same view was expressed in *Ghusaram v. Parashram* AIR 1936 Nag 163 and *Deoki Nandan Singh Vs. Saiyed Jawad Hussain and Another*, In the latter case, a Division Bench of the Patna High Court reiterated the same legal position.

18. Thus, fairly a large number of the High Courts have taken the view that the attachment before judgment would not affect the sale in pursuance of an agreement to sale entered into prior to the date of attachment. The view, in the circumstances taken by the Deputy Director of Consolidation is fully supported by Order 38. Rule 10. C.P.C. and other decisions of the various High Courts.

19. Sri B. D. Tripathi sought to raise some new contentions which were not raised before the Subordinate Authorities. He therefore cannot be permitted to take up those pleas. Even otherwise, in view that I have taken, it is not necessary to enter into all those questions.

20. For the reasons given above, the writ petition has no force. It is, accordingly, dismissed. In the circumstances of the case, the parties will bear their own costs.