

(1979) 10 AHC CK 0062
In the Allahabad High Court
Case No : Second Appeal No. 1912 of 1975

Bhairon Prasad Chaurasiya

APPELLANT

Vs

Smt. Tara Devi and Another

RESPONDENT

Date of Decision : 26-10-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 60
Contract Act, 1872 — Section 31
General Clauses Act, 1897 — Section 3(36)
Specific Relief Act, 1963 — Section 15

Citation : AIR 1980 All 36

Hon'ble Judges : K.N. Seth, J;K.C. Agrawal, J;A.N. Varma, J

Bench : Full Bench

Advocate : R.P. Tripathi and Ravi Kant, for the Appellant; D.S. Sinha, for the Respondent

Final Decision : Allowed

Judgement

A.N. Varma, J.—The question which falls for determination in this appeal is whether it is legally permissible to attach and sell an agreement to purchase an immovable property in execution of a decree A Division Bench of this Court had occasion to consider this precise question in the case of Prem Narain Kapoor v. Sudh-risht Narain Anad reported in 1970 All LJ 721 . The Division Bench considered the question in depth and answered it in the affirmative. However, when this execution appeal came up for hearing before a learned single Judge, he felt that the above decision needed reconsideration in view of certain observations made by the Supreme Court in the case of Swami Motor Transport (P) Ltd. and Another Vs. Sri Sankaraswamigal Mutt and Another, . In the opinion of the learned single Judge, the observations made by the Supreme Court in the above case rendered the decision of this Court in the case of Prem Narain Kapoor v. S. N. Anad (supra) of doubtful validity. On a reference made by the learned single Judge, the case had been placed before us.

2. We may now briefly set out the facts which are relevant for the determination

of the controversy.

3. The appellant held a money decree against the judgment-debtor respondents. The appellant and the judgment-debtor-respondents had also entered into an agreement on 18-9-1967 whereby the appellant had agreed to sell a house to the judgment-debtor-respondents. The judgment-debtors had instituted a Suit No. 37 of 1974 against the appellant for specific performance of the contract to sell the house. In execution of the decree held by the appellant, he applied for attachment and sale of the aforesaid agreement dated 18-9-1967, which had been filed by the judgment-debtors in their suit for specific performance of the contract. The judgment-debtor-respondents filed an objection u/s 47 of the CPC and asserted that the agreement in question was not liable to attachment and sale in execution of the decree, the execution being prohibited by the provisions of Section 60(m) of the Code of Civil Procedure.

4. The executing court overruled the objections of the judgment-debtor-respondents relying on the decision of this Court in *P. N. Kapoor v. S. N. Anad* (supra).

5. Aggrieved by the decision of the executing court, the judgment-debtor-respondents filed an appeal which has been allowed by the learned Additional Civil Judge, Allahabad, by his judgment and order dated 5-3-1975. The learned Additional Civil Judge noticed the decision of this Court in *P. N. Kapoor v. S. N. Anad* but preferred to place reliance on the decision of the Supreme Court in the case of *S. M. Transports (P.) Ltd. v. Sri S. Mutt* (supra), and held that the agreement to sell the property was not liable to attachment and sale in execution of the decree held by the decree-holder-appellant. As a result, the appeal as well as the objection of the judgment-debtor u/s 47 of the CPC were both allowed. Hence, this execution second appeal by the decree-holder.

6. These being the facts, it is evident that the result of the appeal would depend entirely on the answer of the question formulated by us at the beginning of this judgment. As already noted above, this Court has answered the question in the affirmative, and held that Section 60 of the CPC does not prohibit attachment and sale of an agreement to sell an immovable property.

7. Learned counsel for the appellant contended that the view taken by this Court in the case of *P. N. Kapoor* was perfectly correct and it ought to be affirmed by us. Learned counsel for the judgment-debtor-respondents, on the other hand, urged that the decision of the Supreme Court in the case of *S. M. Transports (P.) Ltd. v. Sri S. Mutt* (supra) directly covers the controversy, and in view of the law laid down in that case, we must hold that the case reported in 1970 All LJ 723 (supra) does not lay down the law correctly.

8. Having heard learned counsel for the parties, we are clearly of the view that the decision of this Court in *P. N. Kapoor*'s case (supra) is perfectly sound and that the observations made by their Lordships of the Supreme Court in the case of *S. M. Transports (P.) Ltd v. Sri S. Mutt* do not affect the correctness of the

opinion of this Court as expressed in P. N. Kapoor's case.

9. We now proceed to give out reasons. In P. N. Kapoor's case, the sole question which arose for consideration was whether a right to get a property reconveyed was a property which could be attached and sold in execution of a decree. The appellant in the said appeal had submitted that u/s 60 of the Code of Civil Procedure, only a tangible movable or immovable property could be made subject of attachment and sale. The argument was that an agreement to re-convey a property was not a tangible property and was, therefore, not liable to attachment and sale. This Court went into the question in considerable depth and observed as follows at p. 723 of the said Report:--

"A perusal of this section shows that apart from the specific items mentioned in this section and save as otherwise provided, all saleable properties whether movable or immovable belonging to or over which or over the profits of which a judgment-debtor has a disposing power can be attached and sold in execution of the decree. The Legislature clearly intended that all saleable properties belonging to over which the judgment-debtor has a disposing power should become liable to attachment and sale. The words "movable or immovable" used after the words "saleable property." were used to clarify that all property of whatever nature it may be, if it is saleable, can be attached and sold in execution of a decree. These words were not used to limit the type of property which could be sold, to corporeal properties alone. According to Section 3(35) (Section 3(36)) of the General Clauses Act, which applied to the interpretation of the Code of Civil Procedure, the words "movable properties" would mean property of every description except immovable property. It means that if there is a property of any description and it cannot be said to be immovable property it will be covered by the words movable property. Use of the words property of any description in this section clearly negatives the suggestion made on behalf of the counsel for the appellant that in Section 60 the words "movable property" have been used as being confined to "corporeal property."

10. We are in complete agreement with the above statement of the law. In our view, having regard to the width and the amplitude of the words in Section 60 of the Code of Civil Procedure, particularly the words "All other saleable property, movable or immovable, belonging to the judgment-debtor, or over which or the profits of which, he has a disposing power....", properties of all sorts and of whatever nature, whether movable or immovable, are, save for the exceptions specifically mentioned in Section 60(1) C. P. C., liable to attachment and sale in execution of a decree. The only qualifications are that the property must be saleable, and the judgment-debtor should have a disposing power over it.

11. That an agreement to sell an immovable property is property, can hardly admit of any doubt. Salmond on Jurisprudence (12th Edition) has observed thus at page 411:--

"In its widest sense, property included all a person's legal right of whatever

description".

12. Indeed, that an agreement to sell is at least "property" was not seriously disputed before us. What the learned counsel for the respondents urged was that the property in order that it may be liable to attachment and sale must be saleable. His further argument was that in any case, an agreement to sell was covered by Clause (m) of the exceptions enumerated in Section 60 of the Code of Civil Procedure. u/s 3(35) (Section 3(36)) of the General Clauses Act, movable properties are defined as properties of every description except immovable property. Section 54 of the Transfer of Property Act lays down that a contract for the sale of immovable property does not itself create an interest in such a property. An agreement to sell property is, therefore, a "movable property". according to the General Clauses Act.

13. The only question, therefore, that remains to be considered is whether an agreement to sell an immovable property is a saleable property. This aspect too was considered at some length by the Division Bench in P. N, Kapoor's case (supra). The Division Bench referred to the following decisions :--

(1) AIR 1940 Bom 339, Wishweshwar Narsabhata Gaddasa v. Durgappa Irappa Batkar;

(2) AIR 1928 PC 174, Sakalaguna Nayudu v. Chinna Munnuswami Nayakar;

(3) Sinnakaruppa Gounder Vs. M. Karuppuswami Gounder and Another, , in which it has been held that an agreement to get a property reconveyed is assignable. The Division Bench also referred to the decision of their Lordships of the Supreme Court in Khardah Co. Ltd. v. Raymon and Co. (India) Pvt. Ltd. reported in AIR 1962 SC 1810 In this case, the Supreme Court has observed that rights under a contract are assignable unless the contract is persons in its nature or rights are by their very nature of incapable of being assigned.

14. Following the abovementioned decisions, the Division Bench concluded that an agreement to sell an immovable property was clearly assignable, unless there was a contract to the contrary in the agreement itself. We are in complete agreement with this view of the Division Bench. In our opinion, unless the contract itself provides that the agreement to sell shall not be assigned or that the terms of the contract lay down conditions which may indicate that the contract has to be personally performed by the parties to it, an agreement to sell a property is assignable. This conclusion is supported by the provisions of Section 15 of the Specific Relief Act, 1963, the relevant part of which is quoted below:--

"15. Except as otherwise provided by this Chapter the specific performance of a contract may be obtained by--

(a) any party thereto;

(b) the representative in interest or the principal, of any party thereto:

Provided that where the learning, skill, solvency or any persona] quality of such

party is a material ingredient in the contract or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party".

It may be noted here that the judgment-debtor did not plead in the courts below that the agreement in question contains any prohibition against assignment of the rights thereunder. The argument advanced on behalf of the Judgment-debtors in the courts below was that an agreement to sell or purchase a property was, as a matter of law, incapable of being assigned. We have already held above that save for the exceptions mentioned in proviso to Section 15(b) of the Specific Relief Act, an agreement to sell or purchase a property is clearly assignable. It is hardly necessary to add that that which is assignable is clearly a saleable. We hold that a right to get a property is itself a property, distinct and separate from the property which is sought to be purchased and that such a right is saleable and, therefore, liable to attachment and sale. We have reached that conclusion notwithstanding that an agreement to sell does not create an interest in the property agreed to be sold.

15. We now turn to the decision of the Supreme Court in the case of Swami Motor Transport (P) Ltd. and Another Vs. Sri Sankaraswamigal Mutt and Another, to see whether there are any observations in that case which may cast a doubt on the correctness of the decision of this Court in P. N. Kapoor's case (supra).

16. In that case their Lordships of the Supreme Court were considering the validity of the Madras City Tenants' Protection Act, 1921 as amended by Madras Act No. 13 of 1960. The validity of the Amending Act was assailed by the petitioners inter alia on the ground that the provisions of the Madras Act No. 13 of 1960 was violative of the petitioners' rights guaranteed under Article 19(1) as well as Article 31(1) of the Constitution of India.

17. Under the Madras City Tenants' Protection Act as amended by the Madras Act No. 19 of 1955, one of the two rights conferred on tenants of non-residential building was that the tenant against whom a suit for ejectment was instituted by the landlord was given an option to apply to the Court for an order directing the landlord to sell the land to him for a price to be fixed by the Court. Such a right was equated with the right to purchase the land. By a subsequent Amending Act called the Madras Act No. 13 of 1980, the above right of the tenants was taken away. This gave rise to the argument that the petitioners had come to acquire a right or interest in those lands and that consequently, it could not be taken away in view of the provisions of Article 31(1) of the Constitution of India without payment of compensation. The vires of the Amending Act, namely, Act No. 13 of 1960 was also attacked on the ground that it was violative of the petitioner's right under Article 19(1)(f) of the Constitution of India.

18. Both these arguments were repelled by the Supreme Court on the ground

that the right to purchase the land had not conferred any right or interest upon the tenants in those lands. Their Lordships of the Supreme Court observed thus:--

"We now come to the last question, namely, whether the 1960 Act deprived the appellants of their right in property. To state it differently, the question is whether a tenant of a non-residential building in Tanjore had acquired a right of property under the 1955 Act and whether he was deprived of that right or otherwise restricted in the enjoyment thereof by the 1960 Act. The 1955 Act, as we have already noticed, conferred two rights on such a tenant, namely, (i) every tenant on ejection would be entitled to be paid as compensation the value of any building erected by him, and (ii) such a tenant against whom a suit in ejection has been instituted has an option to apply to the court for an order directing the landlord to sell the land to him for a price to be fixed by the court. We are not concerned here with the rights, conferred u/s 3 of the Act, for the simple reason that neither of the appellants claimed a right thereunder. Both of them have taken proceedings only u/s 9 of the Act and they have approached the High Court for a writ of mandamus that the petition should be disposed of under the provisions of Section 9 of the Act. This Court's opinion on the question of the constitutional validity of the Act in so far as it deprived the appellants of their right u/s 3 of the principal Act is not called for: that will have to be decided in an appropriate case. The question that falls to be considered is whether the second right, namely, the right of a tenant to apply to the court for an order directing the landlord to sell the land to him for a price to be fixed by it, u/s 9 of the principal Act is a right to property. The law of India does not recognise equitable estates. No authority has been cited in support of the contention that a statutory right to purchase land is or confers, an interest or a right in property. The fact that the right is created not by contract but by a statute cannot make a difference in the content or the incidents of the right: that depends upon the nature and scope of the right conferred. The right conferred is a right to purchase land. If such a right conferred under a contract is not a right of property, the fact that such a right stems from a statute cannot obviously expand its content or make it any the less a non-proprietary right. In our view, a statutory right to apply for the purchase of land is not a right of property. It is settled law that a contract to purchase a property does not create an interest in immovable property."

19. Learned counsel for the respondents placed strong reliance on the above observations with particular emphasis on the following words:--

"It is settled law that a contract to purchase a property does not create an interest in immovable property." and again on these words:--

"In our view, a statutory right to apply for the purchase of land is not a right of property".

20. In our judgment, the above quoted observations do not assist the judgment-

debtor. For, firstly, the Supreme Court was neither considering the provisions of Section 60 of the Code of Civil Procedure, nor even the precise question raised before us. The Supreme Court was concerned with the constitutional validity of an enactment wholly different in its content and scope from the provisions with which we are concerned. The question raised, too, before the Supreme Court was entirely different. We may quote here with advantage the observations of Upjohn L. J. in re: Pilkington v. Pilkington in the Court of Appeal (1961) Ch. 466 at p. 489. The observations are:--

"It is a cardinal rule that the observations of judges and the law as stated by them must be read in relation to the issue which they had to try, and their remarks cannot safely be applied to questions which could not have been in the Judges' mind at the time."

This dictum has been reiterated by the Court of Appeal in a recent case in *Hoare Trustees v. Gardner* reported in 1979 (1) Chancery 10 at page 15. We would, therefore, not be justified in applying the observations of the Supreme Court, made in an altogether different context, to the construction of Section 60 of the Code of Civil Procedure,

21. The second reason why we say that the decision of the Supreme Court affords no assistance to the judgment-debtor-respondents is that all that their Lordships of the Supreme Court have said in that case is that a contract to purchase property does not create an interest in immovable property. Their Lordships have no doubt observed in that context that a statutory right to apply for the purchase of land is not a right of property. But those observations have to be read in the perspective of the controversy involved in that case, and if so read, it is clear that their Lordships only laid down that the right which was conferred upon the tenants to purchase the land did not create any interest in the land.

22. The question whether an agreement to sell or purchase a property is itself a property, distinct and separate from the land, was neither raised before, nor decided by their Lordships of the Supreme Court. The appellant in the present case has not contended that the agreement to purchase the house created any interest in that house. His simple argument was that an agreement to purchase the property was itself a property distinct and separate from the property in respect of which he had entered into an agreement with the judgment-debtor.

23. We have not found any observations in the above decisions of the Supreme Court which may lead us to the conclusion that the Supreme Court has, directly or by implication, held that an agreement to purchase a property itself does not partake the character of a right or property.

24. Furthermore, the observations of their Lordships of the Supreme Court must be read in the context of the argument which was advanced before it, The tenants in that case were claiming rights in the land of which they were tenants on the ground that under the law, as it stood before the Amending Act No. 13 of

1980, they had a right to purchase the land, and thereby they had come to acquire a right or interest in the land itself. This argument was repelled by their Lordships of the Supreme Court on the ground that the tenants had not acquired any interest in the land by virtue of the statutory option conferred upon them to purchase the land from the landlords in a suit for ejectment,

25. In our opinion, the Supreme Court has not laid down any law in the case of S. M. Transports Pvt. Ltd. (supra) which may in the slightest degree reflect upon the correctness of the decision of our Court in P. N. Kapoor's case.

26. Learned counsel for the respondents faintly argued that an agreement to purchase a property is covered by clause (m) of the exceptions enumerated in Section 60 C.P.C. which reads as follows :--

"(m) An expectancy of succession by survivorship or other merely contingent or possible right or interest;"

27. Learned counsel submitted that an agreement to purchase a property is merely a contingent or possible right or interest at best. We find no force in this argument. "Contingent right" has been defined in the Indian Contract Act u/s 31, It reads as follows :--

"31. A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen."

28. In our view, an agreement to sell a house is by no means a "contingent contract". Learned counsel contended that the contract is a "contingent contract" because either of the parties to the contract may refuse to perform his part of the contract. The argument is fallacious. Such a contingency would not be collateral to a contract. An agreement to purchase a property is neither a "contingent contract" nor can it be characterised as a mere possible right or interest Clause (m) has, therefore, absolutely no application to a contract for sale of a property.

29. The lower appellate court has also relied on a decision of the Punjab High Court in the case of Roop Chand Vs. Gulzari Lal etc., . The Punjab High Court has observed that a property which is in the custody of the Court cannot be attached in execution of the decree. This argument was also advanced before the Division Bench in P. N. Kapoor's case. The Division Bench ruled that a property did not become custodia legis on the mere ground that a suit had been instituted in respect thereof. We are in agreement with the learned Judges deciding P. N. Kapoor's case on this question as well.

30. The learned single Judge has also referred to a decision of this court in the case of Gorakh Singh v. Sidhgopal reported in ILR 1906 All 383 in which it has been held that the interest in a pre-empted property of a successful pre-emptor who has not yet paid the price fixed under the decree is not a property or interest which could be attached under the provisions corresponding to Section 60 of the Code of Civil Procedure. We find it difficult to understand how this

decision is of any assistance in resolving the controversy, for the interest of the pre-emptor under those circumstances was plainly a mere possible or contingent right till he deposited the price, and consequently, such an interest clearly fell within the four corners of Clause (m) to Section 60 of the Code of Civil Procedure. That decision is, therefore, obviously distinguishable.

31. The result of the aforesaid discussion is that this appeal succeeds and is allowed. The judgment and order dated 5-3-1975 passed by the learned Additional Civil Judge are set aside. The objection of the judgment-debtor-respondents u/s 47 C.P.C. is dismissed. The order passed by the learned Munsif West, Allahabad dated 27-8-73 is restored. The appellant would be entitled to the costs of this appeal from the respondents.