

(1975) 03 DEL CK 0027

In the Delhi High Court

Case No : Election First Appeal No. 6 of 1973

Bharat Finance Co.

APPELLANT

Vs

Shakuntala Devi

RESPONDENT

Date of Decision : 25-03-1975

Acts Referred:

Citation : (1975) ILR Delhi 108

Hon'ble Judges : A.B. Rohtagi, J

Bench : Single Bench

Advocate : G.R. Chopra and S.L. Watel, for the Appellant;

Judgement

Avadh Behari, J.

(1) This is an illustrative case. It brings out clearly the rights of a prospective purchaser of immovable property against an attaching creditor who attaches that very property before it is conveyed to the purchaser in performance of a contract of sale.

(2) The undisputed facts are these. There is a property bearing No. J-2/7, Krishan Nagar, Delhi-31. One V. P. Kapoor was the owner of this property. He entered into an agreement of sale with Shakuntala Devi. Shakuntala Devi was a tenant in this property. The agreement was entered into on November 26, 1968. It provided that Kapur will sell this property to Shakuntala Devi for Rs. 15,000.00. Shakuntala Devi paid Rs. 10,000.00 there and then. The balance was to be paid at the time of the registration of the sale deed. Shakuntala Devi was already in possession of the property as a tenant, as I have said.

(3) On August 5, 1970, Bharat Finance Co. a creditor of Kapur obtained decree for Rs. 17,700.00 and costs against Kapur. The judgment creditor took out execution of the decree. On January 20, 1971, this very house was attached by the judgment creditor.

(4) On January 10, 1971, in pursuance of the contract of sale Shakuntala Devi

instituted a suit for specific performance against Kapur. On January 20, 1971, the judgment-creditor levied attachment. On February 13, 1971, Shakuntala Devi filed objections under O. 21 r. 58, CPC alleging that the property could not be attached and sold in execution of the decree for two reasons : firstly, because she had entered into an agreement of purchase with Kapur which was anterior to attachment and secondly, because she had filed a suit for specific performance which was pending in that very court.

(5) On April 24, 1972, Shakuntala Devi's suit for specific performance was decreed. Thereafter the executing court decided the objections of Shakuntala Devi to the attachment of the property. On October 23, 1972, her objections were allowed and the attachment was lifted. Bharat Finance Co. the judgment creditors now appeal to this court.

(6) What happened later is of considerable importance. In pursuance of the decree of specific performance the heirs of Kapur who had by that time died executed the sale deed in favor of Shakuntala Devi. On May 9, 1973, the sale deed was registered by the sub-registrar. On the date of the registration of the sale deed Shkuntala Devi paid the remaining amount of Rs. 5,000.00 to the heirs of Kapoor.

(7) The counsel for the appellant submits that the judgment-debtor, had no power to transfer the property to Shakuntala Devi after the same had been attached in execution of the decree. The sale, it is said, is void. The property should be put to sale, it is urged.

(8) Two principal questions arise in this appeal. One is : What is the effect of attachment of the property on the agreement to sell dated November 26, 1968 ? The other question is : What is the effect of attachment on the unpaid balance which was admittedly Rs. 5000.00 . I will consider these two questions separately-

(9) On the first question it is clear that the agreement to sell was entered into on November 26, 1968. It is a registered document. Rs. 10,000.00 were paid under it being part consideration of the sale. Rs. 5000.00 remained to be paid. Attachment was levied on January 20, 1971. The property was conveyed on May 9, 1973, in pursuance of the decree of specific performance passed on April 24, 1972. Will the attachment nullify the agreement to sell ? Will it invalidate the subsequent sale ? What is the precise effect of attachment on the property ? This is the question to be determined.

(10) Section 64 of the CPC ("the Code") deals with attachment. In so far as it is material it reads :

" WHERE an attachment has been made any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment."

(11) As pointed out in *Madan Mohan De Sarkar and others v. Rabati Mohan Poddar and others*.i. Air 1916 Cal 927 section 64 of the Code could not have been intended to invalidate transactions coming into existence in pursuance of the obligations arising prior to the attachment. In the present case there was a pre-existing obligation on the part of Kapur to convey the property to Shakuntala Devi. Thereafter came the attachment.

(12) As was said in *Rebale Venkata Reddy and others v. Mancadu Yellappa Shetty and others*. Air 1917 Mad 4 (5) (D.B.):

" IT does not see into be sound sense that when a creditor attaches property which is subject to a particular obligation, he should be able to override it."

(13) A sale in pursuance of a pre-existing contract is only the fulfillment of the obligation to which the judgment debtor was already subject on the date of attachment, (sec : Section 40, Transfer of Property Act).

(14) O. 38r. 10 of the Code expressly saves in the case of attachment before judgment rights existing prior to the attachment of persons not parties to the suit. Though there is no similar provision dealing in terms with attachment in course of execution, it can hardly be suggested that different principles apply; See *Yeshvant Shankar Dunakhe Vs. Pyaraji Nurji Tamboli*, , *Jethalal Nanshah Modi Vs. Bachu*, , *Paparaju Veeraraghavayya Vs. Kilaru Kamala Devi and Others*, and *Deoki Nandan Singh Vs. Saiyed Jawad Hussain and Another*,

(15) The principle of law, Therefore, is that where a purchase is subsequent to attachment but the agreement in pursuance of which the purchase is made is prior to the attachment the purchase prevails against the attachment.

(16) This view has been taken in a large number of decisions : See *Paparaju Veeraraghavayya Vs. Kilaru Kamala Devi and Others*, , *Veerappa Thevar and Others Vs. C.S. Venkatrama Ayyar*, , *Diravyam Pillai and Another Vs. Veeranan Ambalam and Others*, , *Athinarayana Konar and Another Vs. V. Subramania Aiyar*, , *Gusaram v. Parashram*, Air 1936 Nag 163 , *Basappa Chanbasappa Chekki Vs. Hanmappa Ramappa Manaur*, , *Rango Ramchandra Kulkarni Vs. Gurlingappa Chinnappa Muthal*, , *Shivshankareppa Mahadevappa Parakanhatti Vs. Shivappa Parappa Kupati*, , *Kochuponchi Varaghese v. Ouseph Lonan*, Air 1952 T&C 467 , *Banta Singh Vs. Dy. Director of Consolidation and Others*, and *M. V. Subbamma v. M. Mallikharjumudu* 1974 (1) Andh. W.R. 135.

(17) In three decisions a contrary view was taken. These are *Tarak Nath Mukherjee Vs. Sanat Kumar Mukherjee and Others*, , *Buta Rain v. Sayyad Mohammad* Air 1935 Lah 71 and *Usha Rani Datta v. Jagahandhu Devnath and another*, Air 1955 Trip 30 . In the cases of *Usha Rani Datta* and *Buta Ram* (supra) the view of Cuming J in *Tarak Nath* (supra) appears to have been followed. Cuming J's decision has been much criticised. *Varadachariar J* expressly dissented from the observation of Cuming J in *Diravyam Pillai and Another Vs. Veeranan Ambalam and Others*, . He preferred to adopt the view of *Pearson J* the

other learned judge who took part in the case of Tarak Nath (supra). In the cases of Paparaju Veerachavayya and Veerappa Thevar (supra) the judges dissented from his view. Baumont Cj did not follow this division in Baseppa Chambassappa (supra). In Calcutta High Court itself woodroffe J. in Madan Mohan v. Rebati Mohan, Air 1916 Cal 927 had taken a different view, as we have seen.

(18) On the authorities, Therefore, there is none except the view of Cuming J in the case of Tarak Nath (supra) which compels me to hold that the attachment will invalidate the sale.

(19) As Varadachariar J tersely put it in Dirayyams case (supra) :

" THE question is not whether any interest has passed under the contract to sell. An 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 recognised in S. 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. Nor can it be said that the sale by the contracting parties executed in pursuance of a pre-existing contract to sell prejudices the attaching creditor, because the sale is merely the fulfillment 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."

(20) There is another point in this case. On May 9, 1973, the sale deed was executed in pursuance of the decree for specific performance. Section 64 affects only private sales after attachment and does not cover enforced execution of a conveyance in obedience to a decree of a court : See Jethalal Nanshah Modi Vs. Bachu, and the case of Ghusaram (supra). If the execution of the conveyance is in obedience to the decree of a court as in this case it is not a case of private alienation. It is not rendered void u/s 64.

(21) There is yet another point in favor of the purchaser. Possession of the property had been delivered to the purchaser under the contract of sale prior to the attachment. In fact she was already in possession on the date of the agreement for sale. Therefore, beneficial interest had been transferred before attachment. What is aimed at by section 64 is only the transfer of the beneficial interest and that, Therefore, the mere conveyance of the legal title after attachment is not affected by section 64. (See Maung San Pwe v. Hamadanee, Air 1925 Ran 382) . The doctrine of part performance will come to the aid of the purchaser.

(22) I think the contract entered into by the purchaser before attachment could be enforced by her against the transferee in court auction & the attaching creditor. (See S. 19(b) of the Specific Relief Act 1963 corresponding to S. 27(b)

of the Specific Relief Act 1887).

(23) The claim of the attaching creditor is not enforceable under the attachment against the sale executed in pursuance of a pre-existing contract and, Therefore, cannot prevail against the sale : See (1910) 7. I.C. 795.

(24) The second question is What are the rights of the attaching decree-holder as regards the unpaid purchase money ? At the date of the attachment what is attached by the decree-holder is the right, title and interest of the judgment-debtor on that date. The judgment debtor has a right to the unpaid balance of the purchase money. To that extent the attachment holds good : See section 55(4)(b) of the transfer of Property Act and the cases of Veeraraghavayya and Ghasaram (*supra*).

(25) Applying this principle to this case what we find is this. The objections of Shakuntala Devi were allowed on October 23, 1972. Attachment was lifted in consequence thereof. The sale was completed on May 9, 1973. In the appeal filed by the decree-holder in the High Court Shakuntala Devi was "restrained from getting the sale deed of the property in dispute executed in her favor." This order was passed on May 14, 1973, by a division bench. But on May 9, 1973, the sale had already been made and Rs. 5000.00 had been paid. Therefore, the decree-holder cannot get the balance of the purchase money to which he would have otherwise been entitled *Gutta Bapineedu v. Gutta Venkayya*.

IF attachment had continued or if he had asked the executing court to direct the intending purchase Shakuntala Devi to deposit the money in court.

(26) The counsel for the appellant has mainly relied on section 54 of the Transfer of Property Act and section 64 of the Code. On a conjoint reading of these provisions he contends that an agreement to sell does not create an interest in property. Therefore, any sale made in pursuance thereof must be void u/s 64 of the Code. This argument is unsound, it is true that an agreement to sell does not create an interest in the property. But the contract certainly creates an obligation annexed to the ownership of the property which in all conscience has to be fulfilled by the seller. The attachment is subject to such an obligation. The effect of attachment is that the judgment creditor has a right to the unpaid purchase money. In short the attachment will not override the conveyance made in performance of a contract of sale prior to attachment; but will fasten on any purchase money paid after the attachment.

(27) In the result this appeal is dismissed. The parties are, however, left to bear their own costs.