
(1970) 04 MP CK 0004

In the Madhya Pradesh High Court

Case No : Miscellaneous S.A. No. 7 of 1969

Brijkishore

APPELLANT

Vs

Kishore Singh and another

RESPONDENT

Date of Decision : 20-04-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 122, 47, 64
Limitation Act, 1963 — Section 14, 5

Citation : (1972) JLJ 478

Hon'ble Judges : K.L. Pandey, J

Bench : Single Bench

Advocate : P.S. Khirwadkar, for the Appellant; M.M. Sapre and N.M. Shah
Respondent No. 1, for the Respondent

Final Decision : Allowed

Judgement

Pandey, J.—This further appeal is directed against an affirming order of the lower appeal Court dated September 18, 1968 by which an application made by the present appellant u/s 47 of the CPC for setting aside an order of attachment was dismissed.

2. The facts, which are material for the disposal on the present appeal, are these. In execution of a decree passed in Civil Suit No. 50-A of 1964, the Civil Judge. Class II, Bhopal passed an order on May 5, 1966 to the effect that a warrant of attachment of 7 acres of land of Khasra No. 487 of village Mandideep be issued. In pursuance thereof the required warrant was issued and executed on May 26, 1966. Subsequently, by a registered sale deed dated December 23, 1966, the present appellant purchased the share of the judgment-debtor in the aforesaid Khasra No. 487 of village Mandideep for Rs. 16,000. On April 12, 1967, he made an application for setting aside the order of attachment on the ground that he could not come to know of the attachment before he purchased the land because it was not validly effected in accordance with the requirements of law for two reasons: (i) a copy of the order of attachment relating to the aforesaid

revenue paying land was not affixed in the office of the Collector, Raisen; and (ii) the attachment was not properly proclaimed by beat of drum in the village. The application was opposed by the decree-holders and, on October 9, 1967, it was ultimately dismissed by the executing Court although that Court found as a fact that the mode of effecting the attachment had the two defects pointed out by the appellant. The executing Court took the view that, in spite of the two defects, the substantial legality of the attachment remained unaffected.

3. Against the order of the executing Court, the present appellant filed in this Court Civil Revision No. 783 of 1967. It was, however, summarily dismissed on November 30, 1967 on the view that an appeal lay against the order of the executing Court.

4. Subsequently, on December 9, 1967 to be more precise, the present appellant filed in the lower Court an appeal against the order of the executing Court. He also made an application u/s 5 read with section 14 of Limitation Act. The lower appeal Court condoned the delay in filing the appeal, but dismissed it on merits on the view that the two defects found in the attachment were mere irregularities within the meaning of Order 21, Rule 90 of the Code that would not vitiate the sale.

5. At the very outset, the Learned Counsel for the decree-holders raised a preliminary objection that the appeal in the lower Court was barred by time and that there was no good cause for extension of time u/s 5 read with section 14 of the Limitation Act because, although the appellant may have acted under the advice of legal practitioners in filing a revision, it could not be said that he(sic) did so after obtaining such advice from competent legal practitioners who had taken reasonable care to ascertain the true legal position. In support of this contention, reliance is placed upon *Mariambai v. Hanifabai* 1966 (sic) JLI 711: AIR 1967 MP 07. That the appellant acted under the advice of legal practitioners is clear from the two affidavits filed in the case, one of them being from an Advocate, Shri Khakad. The question was not whether an appeal lay against an order passed by the Court of first instance. The real question was whether the appellant could claim to be the legal representative of the judgment debtor to file an appeal against that order for the purpose of raising the question he did. In that sense, the question was not so straight or clear that only one answer could be given without any possible doubt or hesitation. Therefore, I, am of the view that the advice given to the appellant, on which he acted in filing a revision, is not one which could not have been given by any other competent and careful legal practitioner. That being no, the lower appeal Court was right in extending the time for filing the appeal to the extent necessary.

6. The only other question for consideration is whether a valid attachment came into existence even though a copy of the order of attachment relating to revenue paying land was not affixed in the office of the Collector, Raisen and the attachment of the property was not properly proclaimed by beat of drum in the village. It is now well settled that, unless all the formalities prescribed to effect

an attachment are duly complied with, it cannot be said that there has been a valid attachment. A strict compliance with the provisions prescribed for the purpose has, therefore, to be insisted upon to hold that a valid attachment has been duly accomplished : *Sinnappan v. Arunachalam Pillai* ILR 42 Mad 844 (FB); *Pokhpal Singh v Kanhaiya Lal* ILR 1946 All 788; *Mariamamma v. Ittoop Poulo* AIR 1952 TC 159 (FB); *Gaya Thakur Vs. Bhagwat Prasad Sharma and Another, Padmavathi Ammal v. Maruthachalam* ILR (1966) 1 Mad 600 and *Sri Krishna Gupta and Another Vs. Shri Ram Babu and Others*, The same view was taken earlier by the Privy Council in AIR 1928 139 (Privy Council) In that case, Lord Shaw referred to the provisions of Order 21, Rule 54 of the Code and observed as follows:

"In view of these provisions the Board listened with some surprise to a protracted argument which culminated in the proposition that a property was in law attached whenever an order for attachment was made. The result, if this were so, would be that a person holding an order could dispense with attachment altogether, as an operation or a fact. Their Lordships need not repeat in another form these propositions. The order is one thing, the attachment is another. No property can be declared to be attached unless first the order for attachment has been issued, and secondly in execution of that order the other things prescribed by the rules in the Code have been done."

(pages 141-2)

As a matter of fact, the view taken by the Privy Council has been relied upon in most of the cases mentioned earlier. The facts of the Madras case(sic) *Padmarathi Ammal v. Maruthachalam Pillai* (supra) were somewhat similar though, in that case, notwithstanding the protest of the purchaser in the private sale from the judgment-debtor, the proceedings had culminated in a sale and delivery of possession with the result that the purchaser was driven to file a suit. It was held that, as the sale in favour of the private purchaser had been effected before a valid attachment, she was not bound by the subsequent proceedings leading to the sale in favour of the auction-purchaser. Their Lordships went on to observe as follows :

"Now with reference to every one of the steps to be taken under Order XXI, Rule 54(2) the language used is imperative. The legislature has made no distinction between one step and another and all of them are aimed at the same purpose. The object of the provision as pointed out in more than one case-vide the observations in *Sinnappan v. Arunachalam Pillai* ILR 42 Mad 844 (FB) and *Murugappa Chettiar Vs. Thirumalai Nadar and Others*, is to protect bona fide transferees from the penal provisions of section 64 of the Code of Civil Procedure. To adopt with respect the language of *Rajagopala Ayyanagar, J.*, in *The Collector of Monghyr v. Keshav Prasad Goenka* (1963) 1 SCR 93, 113, the requirements are insisted upon as protection for safeguarding of the right of property. As noticed already, an attachment not only prohibits the judgment-debtor from transferring his properties, but there is an interdiction against the

public generally from taking benefit under any transfers from the judgment debtor. Any purchaser for consideration however bona fide and even though he be totally unaware of the attachment would, after attachment had been made of the property, take it subject only to the claims enforceable under the attachment. There is an embargo on the acquisition, and enjoyment of property after an attachment, even though there may be no actual notice of the attachment, notice being constructive only, to be inferred from the promulgation of the order of attachment as provided for under Order XXI, Rule 54 (2). This is a restriction on the fundamental rights in property; it may be reasonable in the context; but as in all restrictions its application must be strictly within the letter of the law."

(page 615)

7. It may be argued, though it was not so argued, that according to sub-rule (3) of Rule 54 of Order 21 introduced by a rule framed u/s 122 of the Code, the attachment of the land took effect from the date on which a copy of the order was affixed on the land and the efficacy of that attachment remained unaffected even though the other two formalities pointed out by the appellant were not complied with. I am of the view that such a contention founded upon sub-rule (3) cannot be entertained because it is in conflict with sub-rule (2) as well as with the statutory provisions contained in section 64 of the Code. This is the view taken about an identical sub-rule (3) introduced by the Allahabad High Court: see *Pokhpal Singh v. Kanhaiya Lal* ILR 1946 All 788 and *Sri Krishna Gupta and Another Vs. Shri Ram Babu and Others*, . This view has also been approved by the Madras High Court in *Padmavathi Ammal v. Maruthachalam* ILR 1966 (I) Mad 600.

8. In view of what has been stated in the foregoing paragraphs, the conclusion must be that there was no valid attachment of the property in dispute in this case. That being so, it is not liable to be sold in execution of the decree.

9. The result is that this appeal succeeds and is allowed. The order of the lower appeal Court dated September 18, 1968 and the one passed by the executing Court on October 9, 1967 are set aside and it is found that the property in dispute, namely, 7 acres out of Khasra No. 497 of village Mandideep was not validly attached. Accordingly the executing Court is directed to recall the order of sale of the property. The decree-holders shall bear their own costs and pay those incurred by the present appellant, Brijkishore throughout. Hearing fee in this Court Rs. 50.