
(1969) 07 KAR CK 0007

In the Karnataka High Court

Case No : Regular Second Appeal No. 483 of 1964

Byrappa (decd.) by Lrs. Muni Sanjeevamma and Others

APPELLANT

Vs

S. Mani and Others

RESPONDENT

Date of Decision : 29-07-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 57, Order 38 Rule 11, 64

Citation : AIR 1970 Kar 152 : AIR 1969 Kar 152 : (1969) 2 MysLJ 465

Hon'ble Judges : A.R. Somnath Iyer, J

Bench : Single Bench

Advocate : A.T. Vijayarangam, for the Appellant; M.L. Venkatanarasimhaiah, for the Respondent

Judgement

1. On March 19, 1959 defendant 4 Anjanappa sold the suit properties to a certain Byrappa for a sum of Rs. 5,000. It is on the basis of this sale deed that Byrappa who is now dead brought a suit for declaration that he was the owner of the property and for an injunction restraining the defendants from disturbing his possession. It was not disputed in the pleadings that as stated by the plaintiff in his plaint defendant 4, the vendor, continued to be in possession of the suit property as the tenant of the plaintiff and the plaintiff had presented an application for eviction under the provisions of the Mysore Rent Control Act on the ground that defendant 4 had become a defaulter in the payment of rent. So the undisputed fact was that the plaintiff was in possession of the property through his tenant, defendant 4, when the suit was instituted, and if he establishes title to the suit property he could get the injunction along with the declaration sought by him. If the injunction sought is granted, it would have the effect of prohibiting disturbance of the plaintiff's possession through a disturbance of the tenant's possession.

2. While there was thus no controversy with respect to the question whether the plaintiff was in possession of the property as he indeed was through his tenant, there was a serious dispute with respect to the title asserted by him. The

repudiation of the plaintiff's title was by defendants 1 to 3 on the strength of the execution purchase made in the execution proceedings to which I shall presently refer. Defendant 1 who had lent some money to defendant 4 brought a suit for its recovery in the Subordinate Judge's Court, Civil Station, Bangalore, in O.S. 17 of 1957 and in that suit there was an attachment before Judgment of the properties which formed the subject-matter of the present suit and which were purchased by Byrappa. That attachment was made on April 6, 1957. There was a decree in that suit, and in the execution proceedings the suit properties were brought to sale and were purchased by defendant 2, a stranger auction purchaser, on September 4, 1961. But this sale is not yet confirmed since before any such confirmation could be made, Byrappa instituted the present suit and obtained an injunction restraining defendant 1 from continuing the execution of his decree and defendant 2 from proceeding with the proceedings for confirmation of the sale and restraining further proceedings with respect to that matter,

3. Defendants 1 and 2 contended that since there was an attachment before judgment when Byrappa purchased the property from defendant 4, that sale is void against all claims enforceable under the attachment obtained before judgment by defendant 1. Defendant 3 was another person who had a decree against defendant 4 and that decree he obtained in O.S. 21 of 1958 in the Court of the Munsiff, Civil Station, Bangalore, and he also obtained an attachment before Judgment before defendant 4 executed the sale deed in favour of Byrappa. But it is not necessary to refer to the resistance to Byrappa's suit on the basis of that attachment before judgment since defendant 3 stated before the Court of first instance that his decree has been otherwise satisfied.

4. But the contention urged on behalf of Byrappa was that the attachment before judgment which was obtained by defendant 1 in his suit was no longer subsisting when defendant 4 executed the sale deed in his favour. So the question which had to be decided by the Courts below was whether that attachment was subsisting on that date or had perished.

5. The ground on which it was maintained that the attachment was no longer continuing on the date of Byrappa's sale deed was that on two occasions when defendant 1 presented an execution application for the execution of the decree obtained by him, his execution application was dismissed for default when he was absent and he had taken no steps to proceed with the execution. That the execution applications were so dismissed was not disputed by defendants 1 and 2. Exhibit P-I shows that on October 9, 1957 defendant 1 presented his execution application in which the prayer was for the sale of the attached properties. On June 18, 1958 that execution application was dismissed when the decree-holder and his counsel were both absent. It is in evidence that the next execution application was dismissed on December 10, 1958. It was so dismissed for the reason that the sale fee and the verified statement were not produced by the decree-holder.

6. The Subordinate Judge was of the view that when the two execution applications were dismissed in that way, the attachment obtained by defendant 1 no longer continued to subsist and that the sale in favour of Byrappa was not affected by the attachment which disappeared in that way. But the District Judge was of a contrary view and thought that since the attachment obtained by defendant 1 was an attachment before judgment, the dismissal of the execution applications did not result in the disappearance of the attachment.

7. The question whether the Subordinate Judge is right or whether the view taken by the District Judge is correct, depends upon the interpretation to be placed on Rule 57 of Order 21 of the Code of Civil Procedure, which, when the execution applications presented by defendant 1 were dismissed, read:

"Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease."

The words "and unless specifically ordered" were added in the year 1959 to this rule and did not exist when there was a dismissal of the execution application.

8. The words "where any property has been attached in execution of a decree" have been understood differently by different Courts, some Courts taking the view that those words speak of an attachment made in execution proceedings, while the others take the contrary view that they also refer to an attachment before judgment which becomes an attachment in execution when a decree is made in the suit in which the attachment before judgment was made. The High Courts of Bombay, Nagpur and Andhra Pradesh take the former view, while the High Courts of Bombay, Calcutta, Kerala and of the former State of Mysore take the second although Bombay and Kerala High Courts had taken a different view on an earlier occasion but changed it subsequently.

9. It appears to me that it is proper and reasonable to say that Rule 57 of Order 21 which causes the disappearance of an attachment when an execution application is dismissed for the default of the decree-holder governs not only an attachment made in an execution proceeding but also an attachment before judgment which becomes an attachment in execution when a decree is made in the suit in which the attachment before judgment is made. That that is the proper way of understanding Rule 57 of Order 21 is clear from the Rule 11 of Order 38 of the CPC which says that when the plaintiff obtains an attachment before judgment in his suit and there is a decree in his favour, it shall not be necessary for him to apply for an attachment of that property again in order to enable him to execute the decree against it. The clear meaning of this provision is that an attachment before judgment becomes an attachment in execution when a decree is made in the suit. So the words "where a property has been attached in execution of a decree" occurring in Rule 57 of Order 21 have to be

understood as referring to an attachment in enforcement of which the decree could be executed, and in the case of an attachment before judgment it is that attachment which assumes the character of an attachment in execution of a decree and so becomes capable of enforcement in an execution proceeding.

10. There can be very small reason for thinking that an attachment before judgment does not cease to subsist when an execution application is dismissed for decree-holder's default although an attachment which is made in an execution proceeding so ceases to subsist on such default. There can be no rational distinction between an attachment before judgment which becomes an attachment in execution and an attachment made in an execution proceeding for the purpose of the application of Rule 57 of Order 21, and I should not be justified in understanding the words "where any property has been attached in execution of a decree" with which Rule 57 of Order 21 opens too literally. It could not have been the intention of that rule that an attachment made in an execution proceeding alone should fall to the ground when the decree-holder commits a default, but that notwithstanding such default an antecedent attachment before judgment should continue to subsist.

11. I am therefore, of the opinion that whether it is an attachment before judgment which becomes an attachment in execution or whether it is an attachment made in the execution proceedings, that attachment ceases to subsist when an execution application is dismissed for the decree-holder's default. That, I think, is how I should understand Rule 57 of Order 21 of the Code of Civil Procedure.

12. The Subordinate Judge was, in my opinion, therefore, right in giving Byrappa the decree which he wanted, and the District Judge could not have disturbed it on the erroneous view taken by him that the attachment was still subsisting when the sale deed was executed in favour of Byrappa.

13. Mr. Vijayarangam appearing for the legal representatives of Byrappa who have now been brought on record in this appeal, makes a complaint that the District Judge made an observation prejudicial to the interests of the appellants in para 5 of his judgment. That observation is to the effect that the plaintiff Byrappa did not or could not get any right, title and interest to the suit properties by virtue of the sale deed in his favour. Mr. Vijayarangam is right in making the criticism that this observation overlooks the clear provisions of Section 64 of the CPC which provides no more than that an alienation of an attached property is not wholly void but is void only against all claims enforceable under the attachment. So, the District Judge had to focus his attention on the limited question whether the sale to Byrappa was void against the attachment obtained by defendant 1, and he could not have reached the conclusion that it was void for all purposes as he appears to have done. That observation, in my opinion, is not correct, and since in consequence of the view I take on the interpretation to be placed on Rule 57 of Order 21 of the CPC the District Judge's judgment and decree have to be set aside, the observation made by him to which Mr.

Vijayarangam takes exception also falls to the ground.

14. So I set aside the decree of the District Judge and restore that of the Subordinate Judge with costs in this Court and in the lower appellate Court.

15. Appeal allowed.