
(2008) 11 P&H CK 0065
In the Punjab And Haryana At Chandigarh

Jagroop Singh and Others

APPELLANT

Vs

Boriai Khan (dead) through LRs. and Others

RESPONDENT

Date of Decision : 04-11-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 97

Citation : (2009) 2 CivCC 15 : (2009) 3 PLR 807 : (2009) 1 RCR(Civil) 697

Hon'ble Judges : Rajive Bhalla, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rajive Bhalla, J.—The appellants challenge an order dated 14.12.200S, passed by the Additional District Judge (Adhoc), Fast Track Court, Sangrur, accepting the appeal filed by respondent No. 1, reversing the order passed by the Civil Judge (Senior Division) Sangrur, dated 16.8.1999 and as a result setting aside the sale certificate issued in favour of the appellants.

2. Gurjit Singh, judgement-debtor/respondent No. 2 executed an agreement to sell dated 27.7.1989, agreeing to sell 25 bighas and 11 biswas to one Seo Pal Singh s/o Mukhtiar Singh. As Gurjit Singh, did not execute the sale deed, Seo Pal Singh filed a suit for specific performance on 12.3.1990. Gurjit Singh and Seo Pal Singh entered into a compromise where under, Seo Pal Singh agreed to give up his right to specific performance, subject to payment of a sum of Rs. 1,23,000/- by Gurjit Singh. Consequently, a decree for recovery of Rs. 1,14,000/- dated 16.5.1990 came to be passed against Gurjit Singh. Seo Pal Singh filed Execution No. 62 on 25.9.1990. The property in dispute was ordered to be attached by the Executing Court, as is apparent from the attachment reports Nos. 246 and 247 dated 8.2.1991. Seo Pal Singh passed away and the execution was consigned to records on 24.5.1993. Sarabjit Kaur, his widow and Mukhtiar Kaur, his mother filed fresh Execution No. 66 on 23.7.1993. The property in dispute was attached and thereafter put to auction on 2.9.1996. The appellants purchased the property for a sum of Rs. 1,44,500/- plus 20,000/- paid to Mukhtiar Singh for

discharge of his rights as a mortgagee. The sale certificate was issued on 1.3.1997.

3. At this stage, one Boria Khan, respondent No. 1, filed objections under Order 21 Rule 97 of the Code of Civil Procedure, praying that, the auction and the sale certificate be set aside. It is alleged that Gurjit Singh, the judgement-debtor executed two mortgage deeds in favour of Mohan Lal and Des Raj dated 17.7.1986 and 23.11.1987 for Rs. 18,000/- and Rs. 9,000/- respectively. On 9.5.1988, Boria Khan purchased the mortgagee rights from Mohan Lal and Des Raj by way of a registered sale deed. On 12.5.1986, Gurjit Singh executed an agreement to sell, 10 Kanals and 7 Marias of this land for a sum of Rs. 50,000/-. Rs. 27,000/- was paid to the mortgagees and Rs. 18,000/- was paid to Gurjit Singh. Gurjit Singh, however, did not execute the sale deed, compelling Boria Khan to file a suit for specific performance on 14.8.1989. The suit was decreed, after contest on 2.12.1995. In execution of this decree, the Executing Court appointed a Local Commissioner to execute the sale deed in favour of Boria Khan. The sale deed was executed by the Local Commissioner on 21.2.1997.

4. Boria Khan filed objections to the sale in favour of the appellants and in essence alleged that as his rights, to the auctioned property flow from a prior purchase of mortgagee rights, a prior agreement to sell dated 12.5.1988 and a prior suit, filed on 14.8.1989 though decreed on 2.12.1995, the attachment of the property in dispute pursuant to the decree for recovery of money dated 16.5.1990 and its subsequent sale to the appellants would not effect his rights. It was further contended that the attachment and the sale would not be free from the obligations already incurred by Gurjit Singh under the agreement to sell dated 12.5.1988 and as a result the sale certificate, issued in favour of the auction purchasers has to be set aside. The appellants opposed the objections, by asserting that they had acquired rights of ownership as auction purchasers, under a valid Court auction, held pursuant to valid attachment and, therefore, prayed that the objections be dismissed.

5. The Executing Court dismissed the objections by holding that as Boria Khan had failed to prove his possession, he had no right to file objections under Order 21 Rule 97. It was also held that the rights acquired by the auction purchasers were affected by the decree passed in favour of Boria Khan on 2.12.1995 and the subsequent sale deed executed in his favour on 21.2.1997,

6. Aggrieved by the aforementioned order, Boria Khan, respondent No. 1 filed an appeal. The Additional District Judge, vide order dated 17.7.2003 directed the Executing Court to submit a report on issues No. 1 and 2, which it had failed to decide namely:

1. Whether the sale in favour of auction purchaser is hit by the principles of *Us pendens*? OP-Objector

2. Whether the decree in favour of objection petitioner is null and void as a result of collusiveness and not binding on the rights of auction purchaser? OPR

7. The Executing Court, vide order dated 16.7.2003 held that the auction is hit by the rule of lis-pendens, as the suit for specific performance filed by the objector Boria Khan was pending, when Seo Pal Singh filed his suit. It was also held that there was no evidence to hold that the decree passed in favour of the objector Boria Khan was null and void as it was collusive.

8. The first appellate Court thereafter accepted the appeal and reversed the order passed by the Executing Court. The first Appellate Court held that the objections were maintainable, as there was sufficient evidence, on record, to hold that Boria Khan was in possession of the property. It was also held that the Executing Court was bound to decide all disputes arising inter parties under Order 21 Rule 101 of the Code. It was also held that as the agreement to sell executed in favour of Boria Khan and his suit were prior in time to the suit filed by Seo Pal Singh, the decree passed in his favour and the sale deed executed as a result thereof, would prevail over the auction sale.

9. Counsel for the appellants submits that the first appellate Court committed an error in discarding the sale certificate and in holding that Boria Khan, respondent No. 1 is not in possession of land measuring 10 Kanals and 7 Marias. The suit filed by Boria Khan was decreed, pursuant to a collusive decree dated 2.12.1995. The appellants rights as auction purchasers can not be suborned to the rights of Boria Khan flowing from a decree passed after the property in dispute was attached and auctioned. It is further submitted that as the decree passed in favour of Boria Khan is exparte and collusive, it should have been rejected by the first appellate Court. It is further argued that the principle of lis-pendens does not apply, as the suit that led to the auction was decreed on 16.5.1990, whereas the suit filed by Boria Khan was decreed on 2.12.1995. It is further submitted that the first appellate Court disregarded the written arguments filed by the appellants namely: that the objections filed for setting aside the auction were barred by limitation, the mortgage deeds were not reflected in the revenue record and objections were filed without deposit of a sum equal to 5% of the purchase money as required by Order 21 Rule 89 of the Code. The last argument put forth by counsel for the appellants is that objections under Order 21 Rule 97 of the Code, cannot be filed after issuance of the sale certificate.

10. Counsel for the respondent, on the other hand, submits that the order passed by the first appellate Court does not suffer from any error, whether of law or of fact. The first appellate Court rightly held that Boria Khan is in possession of land measuring 10 Kanals and 7 Marias, as he had purchased mortgagee rights from Mohan Lal and Des Raj, vide registered sale deed dated 9.5.1988. It is submitted that Gurjit Singh executed a prior agreement to sell 10 Kanals and 7 Marlas, in favour of Boria Khan on 12.5.1988, who filed a suit for specific performance on 14.8.1989. As a result, any adjudication of Seo Pal Singh's rights under the subsequent agreement dated 12.3.1990 or any decree passed thereon, is subject to the rights of Boria Khan flowing from his prior agreement and prior suit. It is further submitted that attachment, of the property in dispute,

whether in the year 1991 or in the year 1993, its sale and the issuance of the sale certificate in favour of the appellants, is irrelevant. It is emphatically denied that the decree passed in favour of Boria Khan is collusive, as it is submitted that the suit remained pending for six years. It is further submitted that though the appellants filed written arguments, they did not address arguments on all points. Even otherwise, the objections cannot be said to be barred by limitation. It is further submitted that there is no need for respondent No. 1 to deposit 5% of the auction money, as the objections were filed under Order 21 Rule 97 of the Code and not under Order 21 Rule 89 of the Code. In view of the aforementioned arguments, it is prayed that as respondent No. 1 is owner in possession of 10 Kanals and 7 Marlas, the sale certificate issued in favour of the appellants was rightly held to be ineffectual qua the respondent No. 1's rights.

11. Counsel for the appellants, as is apparent from the grounds appended with the memorandum of appeal has framed a large number of substantial questions of law but during arguments, it was conceded that the following substantial questions of law may arise for consideration:

1. Whether the suit filed by Seopal Singh, the decree passed thereon and the auction held to satisfy this decree would be hit by the principles of Lis Pendens as Boria Khan's suit was admittedly prior in time and is based upon a prior agreement to sell dated 12.5.1988?

2. Whether the attachment of the property in dispute on 25.9.1990, 23.7.1993, 29.4.1994 and 29.7.1994 sold to the appellants on 2.9.1996, duly confirmed by issuance of the sale certificate dated 1.3.1997 could be set aside on the basis of the objections filed by Boria Khan, respondent No. 1?"

3. Whether the first appellate Court committed an error while holding that Boria Khan was in possession of 10 Kanals and 7 Marlas of land and, therefore, entitled to file objections under Order 21 Rule 97 of the Code?

12. I have heard learned Counsel for the parties, perused the impugned judgements and am of the firm opinion that the first appellate Court did not commit any error in accepting the appeal, reversing the judgement of the Executing Court and accepting the objections filed by respondent No. 1.

13. Admittedly, Gurjit Singh was the owner of 26 Kanals and 11 Marlas of land. On 23.11.1987 and 17.7.1986, he mortgaged 10 Kanals and 7 Marlas for Rs. 9,000/- and Rs. 18,000/- with Mohan Lal and Des Raj respectively. Boria Khan, respondent No. 1 purchased the mortgagee rights by way of a registered sale deed dated 9.5.1988. Gurjit Singh, thereafter, executed an agreement dated 12.5.1988, agreeing to sell 10 Kanals 7 Marlas of land to Boria Khan for a sum of Rs. 50000/-. Seo Pal Singh, decree holder, on the other hand, sought to purchase land measuring 25 Kanals and 11 Marlas, (including the 10 Kanals 7 Marlas in dispute), pursuant to a subsequent agreement to sell executed by Gurjit Singh on 27.7.1989. Boria Khan filed a suit for specific performance on 14.8.1989, whereas Seo Pal Singh filed a suit for specific performance on

12.3.1990. The suit filed by Boria Khan was decreed for specific performance on 2.12.1995, whereas the suit filed by Seo Pal Singh was decreed for recovery of a sum of Rs. 1,14,000/- on 16.5.1990. It is an admitted fact that the land in dispute came to be attached by the Executing Court on different dates the first being 25.9.1990 and thereafter came to be sold by way of a Court auction. It is, therefore, apparent that the agreement to sell executed in favour of Boria Khan is prior in time to the agreement to sell, executed in favour of Seo Pal Singh. It is also clear that when Seo Pal Singh filed a suit for specific performance, the suit filed by Boria Khan was already pending. The questions that require adjudication are whether the prior agreement to sell dated 12.5.1988 and the prior suit confer any right upon Boria Khan to assert that the decree passed in favour of Seo Pal Singh, the attachment effected in execution thereof and the sale held and confirmed in favour of the appellants, would not effect his rights.

14. An agreement to sell, confers a right to seek specific performance of the contract, a right to seek refund of the earnest money and a right to claim damages as spelt out in the agreement or otherwise established. An agreement to sell, therefore, creates an obligation, that attaches to the ownership of the property. Any subsequent alienation, therefore, would not be free from obligations flowing from a prior agreement to sell. A decree passed on the basis of a subsequent agreement to sell, would, therefore, be subject to rights that flow from a prior agreement to sell. The agreement to sell executed in favour of Boria Khan, is admittedly prior in time to the agreement executed in favour of the decree-holder Seo Pal Singh. This principle would apply, irrespective of which suit was decreed first and whether the property was attached and sold in execution of a decree passed on the basis of the subsequent agreement. Section 64 (2) of the Code, incorporates this principle reads as follows:

64. Private alienation of property after attachment to be void:

(1) XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX

(2) Nothing in this section shall apply to any private transfer or delivery of the property attached or of any interest therein, made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment.

15. Section 64(2) makes it abundantly clear that the bar enacted by Section 64(1) that any private transfer or delivery of the property attached or any interest therein shall not apply to any interest in property created prior to the attachment. As noticed herein above, the agreement to sell executed in favour of Boria Khan is dated 12.5.1988, the suit based thereon was filed before the suit was filed by Seo Pal Singh and before the property in dispute was attached and auctioned. At this stage, it would also be necessary to make a reference to the provisions of Order 38 Rule 10 of the Code, which reads as follows:

Order 38 Rule 10:

10. Attachment before judgement not to affect rights of strangers, nor bar

decree-holder from applying for sale.- Attachment before judgement 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.

16. Order 38 Rule 10 of the Code, specifically postulates that attachment before judgement shall not affect rights, existing prior to the attachment, of persons not parties to the suit nor bar any person holding a decree against the defendants from applying for sale of the property under attachment in execution of such a decree.

17. While considering a similar controversy, as obtains in the present case and while answering a similar question, namely; whether a prior agreement to sell would prevail over an attachment made in execution of a decree based upon a subsequent contract, the Hon'ble Supreme Court in Vannarakkal Kallalathil Sreedharan Vs. Chandramaath Balakrishnan and Another, , held as follows:

2. An extent of 80 cents of land which is in dispute in this appeal was agreed to be sold in favour of the appellant under an agreement dated October 9, 1978. Before the sale deed was executed, a third party in execution of a decree got the property attached on November 16, 1978. The sale deed was executed on November 23, 1978. The question is Does the sale prevail over the attachment ?

3. XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX

4. XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX

5. We may first draw attention to some of the relevant statutory provisions bearing on the question. Order XXXVIII Rule 10 of the CPC provides that attachment before judgement shall not affect the rights existing prior to the attachment of persons not parties to the suit. u/s 40 of the Transfer of Property Act, a purchaser under a contract of sale of land is entitled to the benefit of an obligation arising out of that contract and it provides that obligation may be enforced inter alia against a transferee with notice. Section 91 of the Trusts Act also recognises this principle that the transferee with notice of an existing contract of which specific performance can be enforced must hold the property for the benefit of the party to the contract. These are equitable rights though not amounting to interest in immovable property within the meaning of Section 54 of the Transfer of Property Act which declares that a contract of sale does not create an interest in the property. On this line of reasoning it has been held by the Madras High Court that the purchaser of (sic under) an antecedent agreement gets good title despite attachment. See: Paparaju Veeraraghavayya v. Killaru Kamala Devi, Veerappa Thevar v. C.S. Venkatarama Aiyar and Angu Pillai v. M.S.M. Kasiviswanathan Chettiar.

6. There is a useful parallel from the decision of the Calcutta High Court in Purna Chandra Basak v. Daulat Ali Mollah wherein it was observed that the attaching creditor attaches only the right, title and interest of the debtor and attachment

cannot confer upon him any higher right than the judgement-debtor had at the date of attachment.

7. Hence under a contract of sale entered into before attachment the conveyance after attachment in pursuance of the contract passes on good title in spite of the attachment. To the same effect are the decisions of the Bombay High Court in *Rango Ramachandra Kulkarni v. Gurlingappa Chinnappa Muthal and Yeshwant Shankar Dunakhe v. Pyaraji Nurji Tamboli*. The High Court of Travancore-Cochin in *Kochuponchi Varughese v. Ouseph Lonan* has also adopted the same reasoning.

8. The Punjab and Haryana High Court, however, has taken a contrary view in *Mohinder Singh v. Nanak Singh*. It has been held that a sale in pursuance of a pre-attachment agreement is a private alienation of property and must be regarded as void against the claim of the attaching creditor. In support of this proposition, Section 64 of the CPC was relied upon which according to the High Court was intended to protect the attaching creditor against private alienation. This was also the observation of the Lahore High Court in *Buta Ram v. Sayyad Mohammad*.

9. In our opinion, the view taken by the High Courts of Madras, Bombay, Calcutta and Travancore-Cochin in the aforesaid cases appears to be reasonable and could be accepted as correct. The agreement for sale indeed creates an obligation attached to the ownership of property and since the attaching creditors is entitled to attach only the right, title and interest of the judgement-debtor, the attachment cannot be free from the obligations incurred under the contract for sale.

Section 64 CPC no doubt was intended to protect the attaching creditor, but if the subsequent conveyance is in pursuance of an agreement for sale which was before the attachment, the contractual obligation arising therefrom must be allowed to prevail over the rights of the attaching creditor. The rights of the attaching creditor shall not be allowed to override the contractual obligation arising from an antecedent agreement for sale of the attached property. The attaching creditor cannot ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgement debtor. We cannot, therefore, agree with the view taken by the Punjab and Haryana High Court in *Mohinder Singh* case.

18. The above judgement, reproduced in extenso, leaves no manner of doubt that an agreement for sale creates an obligation attached to the ownership of the property and an attachment made in execution of a decree would not be free from the obligations incurred under a prior contract for sale. In *Rajender Singh Vs. Ramdhar Singh and Others*, , while remitting the matter, the Hon''ble Supreme Court made a pointed reference that the question whether the agreement entered into by the judgement-debtor prior to the attachment of property in execution of a decree, would prevail over the attachment was considered in *Vannarakkal Kallalathil Sreedharan v. Chandramaath Balakrishnan*

and Anr. (supra) and it was held that the agreement for sale creates an obligation attached to the ownership of property and since the attaching creditor is entitled to attach only the right, title and interest of the judgement debtor, the attachment cannot be free from the obligations incurred under the contract for sale.

19. In view of what has been stated herein above, obligations flowing from the prior contract for sale executed in favour of Boria Khan, would not be effected by the subsequent attachment and sale made, pursuant to the decree passed upon the subsequent agreement to sell. The first appellate Court, therefore, did not commit any error in accepting the objections and deciding the controversy in favour of respondent No. 1.

20. The argument that rights of an auction purchaser have to be protected and should prevail over the rights of respondent No. 1 has to be therefore, answered by holding that the appellants rights as auction purchaser would be subject to the obligations flowing from the prior agreement to sell executed in favour of Boria Khan. It would also be necessary to mention once again that the suit filed by Boria Khan was already pending, when Seo Pal Singh instituted the suit that led to the eventual auction and issuance of a sale certificate in favour of the appellants.

21. As regards the plea that the decree passed in favour of Boria Khan was collusive, there appears to be no reason to hold in favour of the appellants. The suit remained pending for a period of six years and though, the judgement debtor was proceeded against ex-parte, no circumstance has been alleged or material adduced to infer collusion between Boria Khan and Gurjit Singh. As regards the arguments that the principles of lispendens do not apply, suffice it to say, that Boria Khan filed a suit for specific performance on 14.8.1989, whereas Seo Pal Singh filed his suit on 12.3.1990. The first appellate Court, therefore, rightly held that as the suit filed by Boria Khan, on the basis of a prior agreement to sell, was pending when Seo Pal Singh filed his suit, the decree passed in favour of Boria Khan would prevail. Another contention that the objections were time barred, as Article 127 of the Limitation Act, prescribes a limitation of 60 days for challenging a sale certificate, cannot be accepted. Respondent No. 1 was not party to the decree nor to the execution proceedings and, therefore, had no knowledge that the property that had already sold to him, in execution of the decree passed in his favour, had been sold in a Court auction. It is, therefore, apparent that the question of the objections being barred by time would not arise. The submissions that the written arguments filed before the Additional District Judge, Sangrur, were not considered, though to an extent true, would not require acceptance, as most of these arguments are either irrelevant or have been considered. A last argument that as Boria Khan was not in possession of the property in dispute, he could not file objections under Order 21 Rule 97 of the Code, does not merit acceptance, as the first appellate Court, after examining the mortgage deeds, the purchase by Boria Khan of the mortgagee

rights, concluded that he was in possession of the property in dispute and was, therefore, entitled to file objections under Order 21 Rule 97 of the Code.

In view of what has been stated herein above, as the impugned judgement does not suffer from any error, whether of fact or of law and as substantial questions of law framed by the appellants have been answered in terms of the findings recorded herein above, the appeal is dismissed with no order as to costs.