

(2001) 06 KAR CK 0025

In the Karnataka High Court

Case No : Regular First Appeal No. 487 of 1991

N.S. Venkatachalaiah Setty

APPELLANT

Vs

Adinath Jain Swetamber Temple and Others

RESPONDENT

Date of Decision : 26-06-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 65

Citation : (2002) 4 KCCR 2411

Hon'ble Judges : K. Sreedhar Rao, J

Bench : Single Bench

Advocate : D.L.N. Rao, for the Appellant; S. Nanjundaswamy, for Respondent 1, R.B. Sadashivappa, for Respondent 3 and K.M. Chandraprasad, for Respondents 1 and 2, for the Respondent

Final Decision : Allowed

Judgement

K. Sreedhar Rao, J.—The appeal filed against the judgment and decree passed by the XIX Additional City Civil Judge, Bangalore in Original Suit No. 1015 of 1983. The suit came to be dismissed. The appellant is the Plaintiff in the suit filed for partition and separate possession of 1/6th share in the suit property and also for mesne profits. The facts involved in the suit project the riddled situation in law. According to Plaintiff, 1/6th share in the suit property was purchased by her in a Court auction held in Execution Case No. 1036 of 1968 arising out of O.S. No. 505 of 1964. The entire suit property claims to have been purchased by the first Defendant in Execution Case No. 186 of 1969 arising out of O.S. No. 225 of 1964.

2. The suit O.S. No. 505 of 1964 was filed by the 4th Defendant against his creditors for recovery of money.

3. Against one A.P. Padmanabhaiah one of the members of the family a decree is obtained in O.S. No. 225 of 1964, a suit was filed by the 4th Defendant for recovery of money of Rs. 3,000/- in O.S. No. 505 of 1964. The said suit came to be decreed. The 4th Defendant having obtained the decrees one against

Padmanabhaiah one of the members of the family in O.S. No. 505 of 1964 and a decree against all the members of the family in O.S. No. 225 of 1964 for realisation of the amounts filed two separate cases executed in Ex. Case Nos. 186 of 1969 and 1036 of 1968. In Execution Case No. 186 of 1969 the earliest sale of the suit property was taken out. However in the sale proclamation, the attachment obtained against the property by the Plaintiff-appellant in Execution Case No. 1036 of 1968 was indicated. The auction sale was held on 25.8.1972. The first Defendant is the auction purchaser.

4. Before the confirmation of the sale in Execution Case No. 186 of 1969 to an extent of 1/6th share in the suit property Court sale was held for realisation of the decreed liability in Execution Case No. 1038 of 1968. The auction sale was held on 30.7.1972. The Plaintiff-appellant is the auction purchaser of the one-sixth share. The confirmation of sale was made in Execution Case No. 1036 of 1968 in favour of the Plaintiff-appellant on 5.12.1972. Subsequently, the sale in favour of the first Defendant was confirmed in Execution Case on 23.2.1973.

5. Based on the purchase of one-sixth share in the suit property in an auction sale, the Plaintiff-appellant filed the present suit for partition and separate possession of his share in the suit property.

6. The first Defendant has stoutly contested the suit. The second Defendant claims to be the purchaser of the suit property under an agreement of sale from the first Defendant and claims to be in possession of the suit property. The third Defendant is the daughter of erstwhile owner and sister of the judgment debtor in the earlier two suits filed by the 4th Defendant and she claims to be in possession of the entire property as against the claim of the second Defendant. The above narrated facts are all admitted. The trial Court dismissed the suit of the Plaintiff holding that he did not acquire any title in the one-sixth share of the property purchased. Being aggrieved, the present appeal is filed.

7. Heard the Counsel for the appellant and Respondents. Precisely a question would arise in this appeal regarding right and title of the appellant in the one-sixth share of the suit property shown to have been purchased by him in the auction sale. In support of the appellant's cases, the decision of the Patna High Court in Gopal Bux Rai v. Babushyambahari Singh AIR 1940 p. 565 is cited wherein it is held thus:

The words of Section 65 Code Civil Procedure, make it clear that the property does not actually vest in the purchaser at the time of the sale; but once the sale is confirmed, it is deemed to have vested in him as and from that date. Confirmation of a sale is an integral part of the transaction of sale and without confirmation the purchaser acquires no title. Consequently an order prohibiting sale also prohibits confirmation of sale which had already taken place but which had not been confirmed before the prohibitory order was passed. "Title to property sold in execution in Court auction sale passes to the purchaser on confirmation, and the judgment-debtor thereupon ceased to have any title or

interest therein. Fact that the purchaser had not taken delivery of possession does not detract from the completeness of that title. Judgment-debtor after losing title has no right to demand possession or rent from a tenant though latter continues to hold the property under lease granted by judgment-debtor when he had title. In suit for these reliefs by the judgment-debtor tenant is not estopped from pleading that judgment-debtor is not entitled to the reliefs on the ground of such subsequent loss of title. The estoppel of a tenant against questioning the title of the lessor relates only to the date when the lease was granted.

In the decision of the Gujarath High Court in Chimanlal Narsibhai Vs. Amratlal Chhotalal Shah and Another, , it is held thus:

An auction purchaser (Plaintiff) of suit property, in execution of a mortgage decree for sale, is not entitled to claim as compensation from the tenants (Defendants) inducted by the judgment-debtor during the pendency of the darkhast proceedings, the amount of rent paid by them to the judgment-debtor for the period between the date of execution sale (14.12.1957 in the instant case) and the date the sale became absolute (30.4.1959 in the instant case) inspite of notice of sale to the tenants. It is obvious from the provisions of Section 65 read with Order 21, Rules 89 to 92 and 94 and 95 CPC and Article 180 of the Limitation Act of 1908 that the title as well as the possession as regards the property sold in execution of a decree is acquired by the auction purchaser only after the sale becomes absolute as per the provisions of Rule 92 of Order 21 Code of Civil Procedure. Till the sale became absolute, the Judgments-debtor continued to be the landlord and as such was entitled to collect rent from the Defendants as his tenants. The payment of that rent to the judgment-debtor by the Defendants, therefore, cannot be considered either wrongful or malafide.

The Full Bench of the Allahabad High Court in Nidhpal Sharma and Others Vs. Union of India (UOI) and Others, has held as follows:

The provisions of Section 65 read with Order 21, Rule 94 CPC make it clear that the auction purchaser has no absolute right of ownership or title to the immovable property sold till the confirmation of the sale and on confirmation, that is, the sale becoming absolute, the auction-purchaser acquires title from the date of the sale. But as a result of the sale the auction purchaser does acquire an interest in the immovable property sold. In other words, the auction-purchaser is one who has, since after the sale, a substantial right in the immovable property sold.

On the basis of the ratio laid down in the decisions cited, the Counsel for the appellant strenuously contended that in an auction sale in Execution 186 of 1969 the first Respondent was a purchaser, and no title had passed on him nor it divert the title of the judgment debtor until the sale is confirmed and before the confirmation of the sale, the auction sale has been held in Ex. Case No. 1036 of 1968 the Plaintiff-appellant was the successful bidder and purchased one-sixth

share in the suit property and the confirmation sale in his favour in earlier to the confirmation of the sale made in favour of the first Respondent. In that view submitted that there was a saleable interest in the property when the auction was held in an execution case 1036 of 1968 and consequent to the confirmation of the auction sale, the title in the property to an extent of one-sixth share had passed on to the Plaintiff.

8. Repelling the contention of the Counsel for the Respondents submitted that although provisions contained in Section 65 Code of Civil Procedure, it is clear that after confirmation of sale, the possession of the property in an auction sale relates back to the date of sale. It is only by way of legal fiction retrospective effect is given, when there was no property available for confirmation the legal fiction envisaged in Section 65 would not come into effect and as such any confirmation sale obtained by the first Respondent would exclude the extent of property purchased by the Plaintiff.

9. It is contended that the notice of attachment to an extent of one-sixth share was also notified in the sale proclamation when the property was sold in auction in Ex. Case No. 186 of 1969. Therefore in equity also the first Respondent cannot make out a grievance of absence of notice of the liabilities. Placing reliance on the precedents above cited, it was strenuously contended that the Trial Court was totally in error in holding that the Plaintiff has not acquired any title in the suit property to an extent of one-sixth share as claimed by him.

10. The Counsel for the first Respondent, on the other hand strenuously contended that the decree in O.S. No. 225 of 1964 a charge was created on the entire suit property and the first Respondent is the earliest auction purchaser notwithstanding the fact that the confirmation of sale is at a later point of time however by virtue of the provisions contained in Section 65, the sale becomes absolute from the date of auction sale and not from the date of the confirmation. In that view submitted that there was no saleable interest in the suit property available for the Plaintiff to purchase in Ex. Case No. 1036 of 1968. In support of his contentions, relied on the ruling of the Kerala High Court in Thiru Venkata Reddiar v. S. Noordeen and Anr. AIR 1978 11 it is held thus:

In this connection two questions arise for consideration Firstly what is the effect of a prior attachment against an earlier sale in pursuance of a subsequent attachment against an earlier sale in pursuance of a subsequent attachment and secondly whether the decree-holder in O.S. No. 95 of 1953 had obtained an enforceable charge by the compromise decree. An attachment is the order prohibiting and restraining the Defendant from transferring or charging the attached property by sale, gift or otherwise and all persons from so receiving it and Section 64 of the CPC provides that private transfer or delivery of property attached shall be void against all claims enforceable under the attachment. Its effect therefore is only to prevent alienation and not to confer title by way of charge or otherwise on the attaching decree-holder. Further it is only aimed at private alienations. It does not prevent involuntary alienations. On this aspect of

the matter there is no difference between attachment in execution of a decree and an attachment before judgment. Order XXXVIII, Rule 10 CPC makes this position clear. That Rule provides that the attachment before Judgment shall not affect the rights existing prior to the attachment or persons not parties to the suit, nor bar any person holding decree against the Defendant from applying for sale of the property attached. Such being the effect of an attachment, whether before or after decree, it does not bar a Court sale in execution of another decree and with the Court sale the interest of the judgment debtor passes to the auction purchaser and there is nothing left to be sold later at the instance of another decree holder who may have attached the property earlier. The purpose of the attachment is solely for the purpose of protecting the attaching creditor's right to bring to sale in execution the right, title and interest in the attached property of the judgment debtor and there is no reason for holding that it continued to affect the attached property in any way. When the attached property no longer continues to be the property of the judgment-debtor. The auction purchaser takes the property free from attachment. The consequence no doubt to an earlier attaching creditor is very serious, but his rights are sufficiently safeguarded in such a situation by entitling him a rateable distribution of the proceeds of the sale. This is the only way left to a money decree holder when other like decree holders proceed against the same property in execution. If this were not so, complications will arise between an earlier attaching creditor and a subsequent attaching creditor. If the same was under a private alienation with the earlier sale there is nothing left with the transferor to transfer subsequently to another. In the same manner the prior sale in pursuance of an attachment will prevail over a subsequent sale even if the latter sale was in pursuance an earlier attachment. In otherwords, with the Court sale, all attachment subsisting on the property will fall to the ground. I am supported in these conclusions by the decision of the Calcutta High Court in Kashinath Roy Choudhary v. Surbanand Shaha ILR (1886) Cal 317. If this was not so, it would give rise to great hardship and seriously affect Court sales and there may not be any bidders in Court sale. Hence it must be taken as fairly settled that when a property is sold in execution of a money decree it cannot be sold again at the instance of the decree holder who had attached it before it was actually sold. The consequence is on the happening of a judicial sale all previous attachment effected upon the property sold fall to the ground. On the facts of this case, if the revision Petitioners right is only based on attachment before judgment in O.S. No. 95 of 1953 he has no right over the properties because before he actually sold then in execution of the above decree they had been attached and sold in execution of the decree obtained by the Respondent. The fact that the case before confirmation of the sale in O.S. No. 38 of 1960 the sale in O.S. No. 95 of 1953 was confirmed is also irrelevant for Section 65 CPC provides that with the confirmation the vesting of title will relate back to the date of sale.

11. In the decision of the Andhra Pradesh High Court in Parachuri Veerayya Vs. Yalavarti Veeraraghavayya and Others, it is held thus:

Section 64 CPC does not enact an absolute prohibition of the sale of the property on which the attachment is subsisting. A private sale of property subject to attachment can be avoided by the attaching creditor or his representative-in-interest. This does not preclude the same property from being brought to sale in execution of another decree. Sub-section (2) of Section 63 clearly implies that the attachment of the property does not operate to oust the jurisdiction of another Court to bring that property to sale. This section provides the machinery for adjudicating claims and objections to the attachment of the same property in two or three Courts. Sub-section (2) lays down that even if a sale is held contrary to the procedure indicated in Sub-section (1), it is not invalidated for that reason.

The ruling of the Supreme Court in *Vannarakkal Kallalathil Sreedharan Vs. Chandramaath Balakrishnan and Another*, wherein it is held thus:

Under a contract of sale entered into before attachment the conveyance after attachment in pursuance of the contract passes on good title inspite of the attachment. The agreement for sale indeed 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 judgment debtor, the attachment cannot be free from the obligations incurred under the contract for sale. Though Section 64 CPC 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 judgment-debtor.

12. In *Hamda Ammal Vs. Avadiappa Pathar and Others*, wherein it is held thus:

Rule 5 of Order 38 CPC would not apply where the sale deed has already been executed by the Defendant in favour of a third person. A transaction of sale having already taken place even prior to the institution of a suit cannot be said to have been made with the intention to obstruct or delay the execution of any decree. Rule 10 of Order 38 also makes it clear that attachment before judgment shall not affect the rights. Existing prior to the attachment, of persons not parties to the suit. It would however a different case altogether if a creditor wants to assail a pre-attachment transfer by sale u/s 53 of the Transfer of Property Act, 1882. Such suit would be decided on total different consideration in accordance with the provisions of Section 53 of the Act.

The commentaries in Mulla Code of Civil Procedure, 14th Edition, at page 439 is relied on. The excerpts of which are hereunder noted for convenient reference:

This gave rise to some difficulty when the question arose as to which of two successive auction purchasers should have priority in cases where the later

purchaser had the certificate of sale issued to him first. Had the question been determined with exclusive reference to the terms of that section, the priority would have rested with the purchaser who first procured the certificate of sale. But this inequitable result was avoided, and the difficulty was got over by holding that the first purchaser had by his prior purchase obtained an equitable interest in the property, and that the subsequent purchaser must be deemed to have purchased to property subject to such interest (*Yeshwant v. Govind* (1886) 10 Bom 453; *Chintamanrav v. Vithabi* (1887) 11 Bom 88. No such difficulty can arise under this Code, for it is provided by the present section that the property is to be deemed to have vested in the purchaser from the date of sale, and not from the date of the certificate of sale.

Illustration.-In execution of a money-decree obtained by A against B, certain immovable property belonging to B is sold and purchased by P1. The same property is subsequently purchased by P2 at a sale in execution of a money-decree obtained by C against B. P2 obtains a certificate of sale first, and is placed in possession of the property. Subsequently P1 obtains a certificate of sale, and sues P2 for possession. Under the present Section P1 is entitled to possession, for the property is to be deemed to have vested in him from the date of sale, and the sale to him was prior to the sale to P2. The same result was arrived at under the Code of 1882 by holding that P2 bought subject to P1's equitable interest and he could not, therefore, retain possession against P1 after P1's title was perfected by the issue of certificate to him. The Principle is that a prior sale in pursuance of an attachment prevails over a subsequent sale even if the subsequent sale is in pursuance of an earlier attachment (*V.S.T. Vonkita Reddiar v. S. Noordeen*, 1978 A Ker 11).

But where property is sold in execution of a decree to P1, and the sale is set aside on the ground of irregularity under Order 21, Rule 90, and the same property is subsequently sold in execution of another decree and is purchased by P2, P2 is entitled to priority as against P1, even though the sale to P1 may subsequently be confirmed. The sale to P1 not have been confirmed until after the sale to P1, P1 is not entitled to priority over P2 for the sale to him (P1) having been set aside, it could not be said that P2 purchased subject to P1's interest in the property. P1 had no interest in the property when it was sold to P2 (*Banke Lal v. Jagat Narain* (1900) 22 All 168).

Placing reliance on the aforesaid authorities, the Counsel for the contesting Respondent submitted that in O.S. 225 of 1964 a charge was created on the entire property to an extent of Rs. 1,60,000/- and odd and subject to the charge, the property was brought to sale. Merely because in the proclamation proceedings, the attachment obtained by the Plaintiff was shown, it does not defeat the right of the auction purchaser to have the conveyance of title in law. Whatever attachment earlier made, cannot defeat the right of an auction purchaser. The property was sold for a sum of Rs. 3,00,000/- and odd. Therefore any liability recoverable in O.S. No. 505 of 1964 could have been recovered by

way of attaching the sale amount realised in Execution Case No. 186 of 1969 and bringing the property for sale for a second time is neither warranted nor tenable in law.

13. After going through submissions and the citations presented in the course of arguments, I am of the view that the ruling of the Supreme Court cited at the Bar by the Counsel for the Respondent has no bearing on the facts of this case. In *Vannarakkal Kallalathil Sreedharan Vs. Chandramaath Balakrishnan and Another*, the question in the said case was in relation to the contractual obligation incurred prior to the attachment in question. In that context it was so held that by the attachment any contractual obligations or liabilities incurred in respect of the property would not get defeated and the parties would be entitled to such rights or obligations and can enforce them notwithstanding the attachment. In *Smt Violet Issaac and Others Vs. Union of India (UOI) and Others*, in relation to provisions contained in Rule 10 of Order 38 CPC it is held that attachment before judgment shall not affect the rights, existing prior to the attachment of persons not parties to the suit. It would, however, be a different case altogether if a creditor wants to assail a pre-attachment transfer by sale u/s 53 of the Transfer of Property Act, 1882. Such suit would be decided on totally different considerations in accordance with the provisions of Section 53 of the Act.

14. In the decision of the *Parachuri Veerayya Vs. Yalavarti Veeraraghavayya and Others*, the point involved was the jurisdiction of the Executing Court to bring the property for sale when the property was attached by another Court. It was held that mere existence of an attachment would not debar the subsequent Court to carry out the sale in the execution proceedings and the auction purchaser in such a sale derive valid title.

15. The facts in the Kerala High Court case *V.S. Thiru Venkita Reddiar Vs. S. Noordeen and Another*, reveal that the decree holder who has taken prior attachment challenged the attachment of sale of property in a subsequent execution case on the ground that he has taken out prior attachment. In the context of facts it was held that the attachment before attachment shall not affect the rights existing prior to the attachment or persons not parties to the suit nor bar any person holding decree against the Defendant from applying for sale of the property attached. Such being the effect of an attachment, whether before or after decree, it does not bar a Court sale in execution of another decree and with the Court sale the interests of the judgment-debtor passes to the auction purchaser and there is nothing left to be sold later at the instance of another decree holder who may have attached the property earlier. The purpose of the attachment is solely for the purpose of protecting the attaching creditor's right to bring to sale in execution, the right, title and interest in the attached property of the judgment-debtor and there is no reason for holding that it continued to affect the attached property in any way when the attached property no longer continues to be the property of the Judgment debtor. The auction purchaser takes the property free from attachment. The consequence no doubt

to an earlier attaching creditor is very serious, but his rights are sufficiently safeguarded in such a situation by entitling him to a ratable distribution of the proceeds of the sale. On close reading of the facts and the ratio laid down it does not appear to me that the ratio has any application to the facts of the case. The question of directing the Plaintiff to go for a ratable distribution does not arise because he is not a decree holder but he is equally an auction purchaser like the first Respondent. The provision of ratable distribution are applicable only to the decree holders.

16. In the present case two auction sales are held followed by sale confirmations. The first Respondent is the earliest auction purchaser. In favour of Plaintiff, the confirmation of sale is earlier although the auction is subsequent in point of time. None of the case cited at the Bar by the Counsel for the Respondent, appears to have any bearing on the facts and the points involved in the present case.

17. The Commentaries on CPC by Mulla at page 439 is only the opinion of the author based on hypothetical set of facts given as an illustration solely drawing analogy from the facts in the decision of the Kerala High Court AIR 1978 11. In the illustrated facts to bring home the legal fiction of relating back the confirmation of the sale to the auction it is said that although the sale confirmation of P.1 subsequent to the sale confirmation of P.2 since the auction held in favour P1. being earlier in point of time, it is opined by the author that the sale confirmation should relate back to the date of auction and that when P.2 purchased the property it is opined that there is no salable interest.

18. As against the individual view of the learned author, the rulings cited by the Counsel for the appellant project altogether a different legal view contrary to the one held by the learned author. In fact the decision of the Madras High Court in (Inuganti) Venkata Madhava Rao Vs. Garapati Narayanamurty and Others, is clearly on the point. The decision of Allahabad High Court cited at the bar although in a different context, the ratio lays down the law clearly that merely by the fact that there is an auction sale held, the title would not pass on to auction purchaser until the sale is confirmed and the auction purchaser does not acquire any interest in the immovable property sold and he does not become owner until the sale becomes absolute. The similar view is taken by Gujarath High Court, Patna High Court and as well by the Travancore and Cochin High Court. After carefully considering the pros and cons of the issue, I am in respectful agreement with the views of the Madras High Court, Allahabad High Court, Gujarath High Court, Patna High Court, Travancore and Cochin High Court which have a direct bearing on the point involved in the case.

19. The Plaintiff by valid purchase of the one-sixth share of the property, in auction sale followed by valid confirmation would become absolute owner to the extent of one-sixth share. Although the contesting Respondent had purchased the entire property under an auction, however at the time of confirmation of his sale, there was no salable interest available for confirmation to an extent of one sixth share in respect of which the Plaintiff had acquired the valid rights. The

legal fiction of relating back u/s 65 CPC would be effective when only there is no intervening situation to prevent the application of legal fiction. In between the auctions sale and confirmation, if there is any intervening circumstances by which the judgment debtor loses salable interest in the property, it cannot be said that by later confirmation the auction purchaser can derive valid title ignoring the intervening circumstances which divest the title of the judgment debtor.

20. In that view of the matter, I find that the view taken by the Trial Court is erroneous and the judgment and decree of the Trial Court is set aside. The appeal is allowed. The suit is decreed as prayed for.