
(1946) 02 AHC CK 0014
In the Allahabad High Court

Pokhpal Singh and Others

APPELLANT

Vs

Kanhaiya Lal and Others

RESPONDENT

Date of Decision : 11-02-1946

Acts Referred:

Citation : AIR 1946 All 438 : (1946) 16 AWR 393

Hon'ble Judges : Yorke, J;Braund, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Yorke, J.—This is a defendants' first appeal. The present suit is suit by an auction, purchaser, to whom possession of the property purchased by him has been refused by the execution Court, to recover possession of that property from certain transferees of the judgment-debtors who were not parties to the proceedings in execution of a decree. One Bhup Singh son of Gulab Singh was the owner of one biswa share in village Khushkari as his separate property. Bhup Singh had two brothers, Pokhpal Singh, defendant 1, and Nek Ram Singh, defendant 2, of the present suit. Defendant 3, Faujdar Singh, is the son of defendant 1 and defendant 4, Nawab Singh, is the son of defendant 2. On the death of Bhup Singh, he was succeeded by his widow Mt. Jawatri. On the death of Mt. Jawatri in the year 1927 Pokhpal Singh and Nek Ram Singh as the nearest reversioners were entitled to be entered in the khewat as owners of the one biswa share, half and half. For some reason which does not appear on the record Pokhpal Singh and Nek Ram Singh and their two sons were recorded as the owners each of a one-fourth Bhare in this one biswa share. Not long after they had obtained possession of this property, Pokhpal Singh and Nek Ram Singh on 6th December 1928, executed a bond for Rs. 400 in favour of one Janki Prasad and this bond was later on assigned by Janki Prasad to the present plaintiff Kanhaiya Lal. Kanhaiya Lal in due course on 2nd June 1931 instituted a money suit No. 240 of 1931 to recover the amount due to him on the bond at that time, impleading as defendants Pokhpal, Faujdar Singh and Nek Ram Singh. On 1st

August 1931 he was given a decree for Rs. 372-1-0 with costs and interest pendente lite and future at 6 per cent, per annum, that is, a decree for Rs. 437-3-0. In October 1931 this decree was transferred for purposes of execution to the Court of the Munsif of Kasganj who on 12th December 1931 at the instance of the decree-holder made an order under Rule 54 of Order 21, Civil P.C., for attachment of this one biswa share. It is in evidence that this attachment was actually effected by proclamation and affixation of a copy of the order on 2nd February 1932. Prior to that date, however, Nek Ram Singh had on 1st January 1932 executed a sale-deed, Ex. A-12, in respect of a 5 biswansi (that is one-fourth of one biswa) share in favour of defendant 6, Chhiddu, for Rs. 4500. Under the provisions of this sale-deed Rs. 500 was left in deposit with the vendee on account of the entire amount due under the decree of the Court of the Munsif of Etah, Kanhaiya Lal v. Pokhpal Singh and Ors. in Suit No. 240 of 1931, which was described as being under execution and in connexion with which it was said that the property sold along with other property stood attached. At a much later date, on 10th August 1932, Pokhpal Singh similarly transferred his 5 biswansi share to Bhopal and Hulasi (father of Chhiddu) for Rs. 5000. The consideration consisted entirely of the amounts due to the vendees in respect of prior transactions.

2. On 28th July 1933 the one biswa share, which in the light of the recitals in these sale-deeds must have been shown as considerably encumbered, was put to sale by the Collector (Sales Officer) to whom the execution had been transferred in May 1932 and the sale concluded in favour of one Banarsi Das for a sum of Rs. 175 out of which Rs. 169-7-0 was paid to the decree-holder Kanhaiya Lal towards the decretal debt. Certain objections are said to have been filed by the judgment-debtors under the provisions of Rule 90 of Order 21 but these objections were unsuccessful and the sale was confirmed on 5th January 1934. The matter was taken in appeal to the Commissioner who dismissed the appeal on 21st October 1935, and subsequent applications in revision and. review to the Board of Revenue were dismissed on 3rd October 1936 and 23rd May 1937. While these proceedings were going on, the decree-holder in March 1934 made a fresh application for execution of his decree which was registered as No. 322 of 1934. During the pendency of this execution the judgment-debtors on 2nd January 1936 made an application for amendment of the decree under Sections 5 and 30, U.P. Agriculturists' Relief Act, to the execution Court. The application was opposed by the decree-holder but on 13th March 1936 the Court passed orders amending the original decree so as to reduce the principal amount from Rs. 372-1-0 to Rs. 350-5-0 and allowing payment by 10 equal instalments.

3. Thereafter on 4th May 1937 as the result of certain proceedings in his Court, the same sale proceedings which had begun in 1932, the Sales Officer accepted a statement made by Banarsi Das that he had been, bidding at the auction sale only on behalf of Kanhaiya Lal and directed that a sale certificate should be issued in the name of Kanhaiya Lal and on 11th May 1937 the sale certificate was so issued. Within a few days Kanhaiya Lal relying on his sale certificate made an

application in the execution Court, that is the Court of the Munsif of Kasganj, to be put in possession of the property in respect of which he had obtained a certificate that he was the auction-purchaser. This application was, however, dismissed by the learned Munsif a year later on the ground that by reason of the amendment of the decree the execution proceedings and the sale which took place in the course of those proceedings had become null and void. Applications in revision were made to this Court against the order amending the decree and also against the order refusing to put the auction-purchaser in possession of the property. These two applications came before Mulla J. on 24th March 1939 and at the hearing it was conceded that the revision application against the order refusing possession could not succeed as long as the order amending the decree and converting it into an instalment decree stood intact. The application for revision against the amending order had not been made until more than two years subsequent to the amending order of 13th March 1936. The application against the amending order was dismissed, it being held by Mulla J. that it was open to the Court to reopen the whole decree even though a part of it had been satisfied and to re-adjust the account between the parties in accord, ance with Section 3, U.P. Agriculturists' Relief Act. It was also remarked that the application must necessarily fail also on the ground that it was hopelessly belated.

4. The auction-purchaser having thus failed to obtain possession of the property which had been purchased by him in the auction-sale confirmed on 1st January 1984 instituted the present suit for possession on 13th September 1939, impleading as defendants the judgment-debtors against whom he had purchased the property and transferees under the deeds of 11th January 1932 and 10th August 1932. A number of defences were taken in a joint written statement filed by Nawab Singh, Paujdar Singh, Hulasi, Bhopal, Pokhpal Singh and Chhiddu defendants. They did not specifically defend the sale deed of 10th August 1932, but they con-tended that the suit was barred by res judicata by reason of the decision of this Court on the revision application. They contended that the plaintiff had no title because, as contended before the Munsif on the application made by the plaintiff for possession, the auction sale was said to have become void by reason of the amendment of the decree. It was further said that the plaintiff had no right of suit because, although the sale certificate had been issued in his name, he was not the person in whose favour the sale concluded and the issue" of sale certificate in his favour was contrary to law. A plea was raised that the suit was barred in view of the provisions of Article 11A, Limitation Act, and it was said that the sale.deed in favour of Chhiddu, that is the sale-deed of 11th January 1932, was honestly and lawfully executed for consideration in satisfaction of old debts.

5. The learned Civil Judge held that the suit was not barred by the rule of res judicata and that question has not been raised in argument in appeal. Similarly, he held that it was not barred by limitation as the suit fell within the provisions of Article 138, Limitation Act, and Article HA was not applicable. That finding has also not been contested in appeal. The first point discussed at length by the

learned Civil Judge was that which arose on issue 4, namely, "Whether the sale is null and void, if so, how does it affect the suit?" The learned Civil Judge after considering certain decisions came to the conclusion that the sale held and confirmed in the plaintiff's favour with regard to one biswa property of village Khushkari was perfectly valid and legal and on the basis of that sale the plaintiff was certainly entitled to possession of the property, although at the same time he said that in the light of the decision of this Court in revision on 24th March 1939 he was bound to hold that the whole of the decree was liable to be re-opened for the purposes of instalments and reduction of interest (under Sections 5 and 30, Agriculturists' Relief Act). On issue 5 he held that the one biswa share was not ancestral property and it would follow that the sons of Pokhpal Singh and Nek Ram Singh did not on the death of Mt. Jawatri inherit any share in that property. On issue 7 which raises the question of the plaintiff's right of suit to obtain possession when he was not the person who actually bid at the auction sale, it was held that the sale certificate having been prepared in his favour was good and valid and in consequence he was the real owner of the property sold in the auction proceedings and was entitled to obtain possession.

6. Only three points have been argued in this appeal. First it is contended that the plaintiff had no title to the property in suit because by virtue of the proceedings under Sections 3 and 5, Agriculturists' Relief Act, and the amendment of the decree the auction sale has been rendered null and void. Secondly, it has been contended that in view of the fact that the plaintiff was not himself the person who actually bid at the auction the sale certificate issued in his favour is invalid and confers no title upon him. Thirdly, it has been contended that even if it be held that the sale certificate is valid and the plaintiff entitled to maintain the present suit for possession, the suit must fail in respect of the property transferred by Nek Ram Singh in favour of Chhiddu on 11th January 1932, that being a perfectly good and valid transfer not affected by the provisions of Section 64, Civil P.C. This last point is a pure point of law which obviously arose out of the pleadings but was not the subject of any specific issue and not apparently considered or decided in the Court below. It raises an important question of the construction of Rule 54 of Order 21 which we shall have to consider in due course.

7. As regards the first contention put forward in appeal, namely, that the order of 13th March 1936 amending the decree and allowing instalments has the effect of rendering void the auction proceedings, it appears to us that there is no force in this contention. It is true that it has been held that the result of an amendment of the decree u/s 5, Agriculturists' Relief Act, as also under the corresponding section of the Debt Redemption Act is that there is a new decree in the suit which takes the place of the original decree and it has been held that where a sale in execution of a decree has not been confirmed, it may be set aside on the application of the judgment-debtor who seeks the benefits of the Agriculturists' Relief Act; but that is quite a different thing from holding that in a case where an auction sale has taken place and the sale has been confirmed, the auction-

purchaser can be deprived of rights which Shave vested in him. In this connection it is not possible to derive any assistance from the analogy of sales carried out in execution of a decree which is subsequently set aside in appeal. In such a case a decree-holder auction-purchaser may lose the property, and this is quite understandable since the decree-holder auction-purchaser is saddled with the knowledge that the decree in execution of which the sale has been carried out is not a final decree. The Courts seem to have looked rather kindly on the position of stranger auction-purchasers, although it might well be argued that the first thing which a person coming to bid in an auction sale would investigate would be the question whether the decree under execution was a final decree or not. But in order to hold that an application made as the result of subsequent legislation could have the effect of depriving the auction-purchaser of rights acquired by him prior even to the legislation by virtue of which the decree is revised and instalments granted, would be to hold that this legislation was intended to have a retrospective effect of the most radical and confiscatory kind. There is no ground for interpreting Section 5, Agriculturists' Relief Act, as intended to have a retrospective effect. Indeed if this view could be taken, it would raise most difficult question in regard to the refund of amounts realised by a decree-holder. In my judgment, it would be impossible to hold that an order amending a decree and allowing payment by instalments made under Sections 5 and 30, Agriculturists' Relief Act, has the effect of rendering null and void a sale already completed in execution of the original decree. It follows that the plaintiff could not on that ground be deprived of his right to obtain possession of the property purchased by him.

8. As regards the second question raised on behalf of the defendants appellants, it appears, as already stated, that at the auction sale on 28th July 1933 the property was knocked down to Banarsi Das as the highest bidder. In the year 1936 in proceedings before the sale officer Banarsi Das on 24th March 1938 made a statement that he had not been bidding on his own account but on behalf of the decree-holder and that he had declared that fact at the time of the sale. The sales officer accepted the contention of Kanhaiyalal that the fact declared by Banarsi Das at the time of sale had not been mentioned in the bidding list due to some mistake. The sales officer directed that the bidders' list should be amended accordingly and the sale certificate should be issued in the name of the decree-holder as auction-purchaser and in due course this was done and the sale certificate, Ex. 2, dated 11th May 1937, was issued in the name of Kanhaiyalal. Learned Counsel for the appellants contends that the Court was bound by the provisions of Rule 94 of Order 21 read with Rule 84 to issue the certificate in the name of the person declared at the time of the sale to be the purchaser. It is said that Banarsi Das was declared to be the purchaser and that the issue of a sale certificate in the name of Kanhaiyalal was illegal. It may be that the order of the sales officer was irregular but it appears to me that as Kanhaiyalal is the person in whose name a certificate has been issued his right to maintain the present suit cannot be questioned. The order directing issue of a

sale certificate in favour of Kanhaiyalal might have been questioned by means of appropriate proceedings but that is a different thing. Learned Counsel for the appellants has conceded that this plea is a plea of a very technical nature. In my judgment not only is that so but it is one which at this stage is no longer sustainable. In view, however, of the fact that Banarsi Das might, at some future date, question the title of the present respondent, we have thought it desirable to implead Banarsi Das (or rather his representatives-in-interest, as Banarsi Das is dead) as a party to the suit and necessary steps have for that purpose been taken.

9. As regards the third point, which was argued by learned Counsel on behalf of Chhiddu the vendee under the sale-deed dated 11th January 1932, it was contended on behalf of this appellant that he was not bound by the order of attachment in the light of Sub-rule (3) of Rule 54 of Order 21. This sub-rule was added to Rule 54 by this Court under the provisions of Section 122, Civil P.C., and runs as follows:

The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment-debtor from the date on which such order is made.

10. It was contended on behalf of the respondent, Kanhaiyalal, that it would not be correct to hold that Chhiddu who was shown by the very wording of the sale-deed to have had notice that the property sold to him was under attachment, was a purchaser for value in good faith and therefore entitled to the protection of this sub-rule. Indeed it would appear *prima facie* difficult to hold that a purchaser who takes property with full knowledge of the fact that a property is under attachment, that is, that there is in existence an order prohibiting the judgment-debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge, was acting in good faith. It would seem rather that such a person was conspiring with the judgment-debtor to obtain a transfer of the property and thereby evade the prohibitory order, in effect to commit some sort of a fraud on a Court. Moreover, the wording of Sub-rule (3) implies that the protection given by the rule to bona fide purchasers for value in good faith extends only up to the time at which they have actual or constructive notice of the fact that an order of attachment has been made. It might therefore be said that a person who *ex hypothesi*, in virtue of the admission contained in the sale-deed itself, has already got notice of the attachment does not come within the protection of this sub-rule.

11 On the other hand it might be said that on a perusal of Rule 54(3) as it stands a counsel might well advise a client consulting him about such a proposed purchase that although he no doubt had notice of the order of attachment yet that order would not take effect against him unless and until a copy of the order were to be affixed on the property and that, therefore, he was free to enter into the transaction. In the course of argument, however, we have been led to the

conclusion that Sub-rule (8) of Rule 54 is really, repugnant to the provisions of Section 64, Civil. P.C. It has been held in a number of cases that attachment is not made within the meaning of Section 64 of the Code by the mere making of an order for attachment. That was the view taken in early decisions of this Court under the Procedure Codes of 1859 and 1882 and it. has been maintained under the present Code Order 21, Rule 54, provides as follows:

(1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from, taking any benefit from such transfer or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

12. Section 64 which corresponds to old Section 276 of the Code provides:

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.

13. In *Bharat Chandra Pal Vs. Gouranga Chandra Pal and Another*, it was held that:

In order to invoke the aid of Section 64, Civil P.C., on behalf of a decree-holder an attachment; of immovable property under Order 38 must have-been made in the manner prescribed in Form 24, Appendix B, as contemplated by Order 21, Rule 54. A proclamation by beat of drum and affixing on the property a copy of the order in Form 5, Appendix F, does not constitute an attachment under the Civil Procedure Code.

14. Their Lordships of the Privy Council in *Muthiah Chetti v. Palaniappa Chetti* AIR 1928 P.C. 139 after quoting the provisions of Order 21, Rule 54, remarked that the Board listened with some surprise to a protracted argument which culminated in a proposition that a property was in law attached whenever an order for attachment was made. They remarked that "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. They concluded their remarks by saying:

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.

15. It is thus clear that in virtue of Sub-rules (1) and (2) of Rule 54 of Order 21

an attachment cannot be said to have been made unless and until the provisions of both sub-rules have been complied with. It appears to be obvious that this proposition may be stated in another way, namely, that the order of attachment (under Sub-rule -(1)) cannot take effect as against anybody unless and until the provisions of Sub-rule (2) have been complied with. It follows that for purposes of Section 64 it cannot be held that an attachment has been made unless and until all these provisions have been complied with and the provision contained in Sub-rule (3) of Rule 34 is not, only inconsistent with the provisions of Sub-rule (2) but is also repugnant to Section 64 by providing that an attachment is to be effective before it has actually been made, whereas Section 64 provides for certain results to accrue only where the attachment has actually been made. In my judgment, therefore, it must be held that the transfer of 5 biswansi share in favour of Chhiddu defendant is protected by the provisions of Order 21, Rule 54 as having been made before any attachment was actually made and it follows from this that in respect of that property, the plaintiff's suit must necessarily fail. In my judgment, the learned Civil Judge rightly decreed the plaintiff's suit for possession in respect of the other three-fourths of the property in dispute. I would accordingly allow the defendants' appeal in respect of one-fourth of the property only with proportionate costs in both Courts. In other respects this appeal fails and is dismissed with proportionate costs.

Braund, J.

16. I agree and only desire to add a word or two in reference to that point which has raised a question under Rule 54 of Order 21 of Schedule 1, Civil P.C., as amended in 1936 by this Court. The words of the amendment are:

(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment-debtor from the date on which such order is made.

17. The expression "purchasers for value in good faith" is extremely curious in that it departs from the well-known expression "bona fide purchaser for value without notice" by the significant exclusion of the two words "without notice." So well-known to lawyers and draftsmen is this collocation of words that, unless there were some compelling reason, I should have found considerable difficulty in reaching a conclusion that the words "without notice" had been dropped unintentionally. The phrase itself shows that absence of notice, though possibly an ingredient of it, is something different from "bona fides" or "good faith." I confess to finding much that is attractive in the view in this respect of Green J. of the Bombay High Court in *Maniklal Atmaram v. Manchershhi Dinsha Coachman* (1875) Bom. 269 although there were features assisting the construction present in that case which are not present in ours.

18. However that may be, I do not desire to express a concluded opinion on the construction of the words "good faith" in Sub-rule (3) of Rule 54 as amended by

this Court because this appeal can, I think, be decided upon this point on different grounds. Section 64, Civil P.C., is the section which says that "any...transfer...of the property attached...shall be void as against all claims enforceable under the attachment," where an attachment has been made. In view of what Lord Sumer (Shaw?) has said in 51 Mad. 349a at p. 356 it is no longer open to doubt that an attachment cannot be said to have been "made" until not only the order for the attachment has been issued but also in execution of that order all the other things prescribed by the rules have been done. In particular that means that no attachment can have been "made" within the meaning of Section 64 until the proclamation under Order 21, Rule 54(2) of the Rules has been completed. Conversely it must necessarily follow that, if u/s 64, Civil P.C., a transfer is made void at the moment of time when the attachment is complete in the sense that all the rules have been complied with, then no such transfer can be void until the attachment is complete, or until, in other words it has been proclaimed.

19. Bearing this in mind, I return again to Sub-rule (3) added to Rule 54 by this High Court. As against "purchasers for value in good faith" it merely applies the law as declared by Lord Sumer (Shaw?) in the case referred to above, except that it only requires the affixing of the order on the property, and not the full steps set out in Sub-rule (2), in order to avoid the effect of the transfer so far as the transferee is concerned. But if the words "purchasers for value in good faith" do not (as is contended in the case before us) include honest purchasers for value in good faith who have notice of the fact that an attachment order has been made, then, as regards that class of transferees, it appears to me to avoid the effect of the transfer before the attachment has become complete, or, in other words, before "an attachment has been made." It seems to me that this is repugnant to Section 61, Civil P.C., which, as explained above, only avoids a transfer when the attachment has been "made," that is to say, when all the steps required by the rules as to proclamation and otherwise have been complied with. Even more startling is the result of the concluding words of Sub-rule (3) of Rule 54 - "and against all other transferees from the judgment-debtor from the date on which such order is made." This seems to treat the attachment as being "made" on the date on which the order for the attachment is pronounced, which is the very thing that Lord Sumer (Shaw?) has said is not the case. In this respect, therefore, the repugnancy between our Sub-rule (3) of Rule 54 and Section 64, Civil P.C., is even more marked than in the case of a purchaser for value in good faith. For these reasons I am inclined to think that, if the words of Sub-rule (8) "purchasers for value in good faith" do not include an honest purchaser for value with notice of the fact that an attachment order has been made, then it is repugnant to Section 64. That by itself is an argument supporting the view that it cannot have been intended that purchasers for value with notice of the attachment order should be excluded from the class of those purchasers who take in good faith.

20. And, finally, the effect of this line of reasoning which start3 with the fact that

an attachment has not been "made" until it has been proclaimed, is that, until that moment arrived, there is no completed adverse title of which the purchaser can have notice. All that he can possibly have notice of up to that point is that steps are in progress from which ultimately a completed attachment may emerge. In other words the judgment-debtor (sic. decree-holder) has not yet grasped the property as against a purchaser who, for value and, in good faith, buys before he completes his hold of it. This seems to me to be a perfectly logical result, since it would surely be inequitable that an honest purchaser should suffer from having notice of the possibility of that which has not yet, and may never, actually occur. We have been referred to two cases in our own High Court, *Nur Aahmad v. Altaf Ali* ('78-80) and *Gangadin v. Khushali* (1985) All. 702 under the Civil Procedure Codes of 1859 and 1876 respectively. I only desire to say that neither of these cases is of any assistance in solving the present problem, since they depend on sections which are totally different from the rules and section with the construction of which we are concerned. For these reasons I also have reached the conclusion that a purchaser for value nonetheless takes his transfer in good faith because of the circumstance that, before the attachment has been proclaimed, he is aware that an order for attachment has been made, I agree that the result of the appeal should be as stated by my learned brother.

21. The order of the Court is that the defendants' appeal is allowed in respect of one-fourth of the property only with proportionate costs in both Courts. In other respects the appeal fails and is dismissed with proportionate costs.