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(2016) 01 KL CK 0130

In the High Court Of Kerala

Case No : WP(C) No. 3501 of 2014 (K)

Sakthivel APPELLANT

Vs

Marayor Service Co-opperative Bank Ltd. and Others RESPONDENT

Date of Decision : 29-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 64
Kerala Co-operative Societies Act, 1969 — Section 78(c)
Registration Act, 1908 — Section 57
Specific Relief Act, 1963 — Section 19

Citation : (2016) 161 AIC 619 : (2016) 1 KHC 881 : (2016) 2 KLT 25 : (2016) 2 KLT 13

Hon'ble Judges : Dama Seshadri Naidu, J.

Bench : Single Bench

Advocate : R. Divakaran, Advocate, for the Appellant; P.P. Jacob, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Dama Seshadri Naidu, J.—1. The petitioner is said to be the owner of an immovable property to an extent of 2.5 cents having purchased the same through Exhibit P1 sale deed from none other than his father, the additional eighth respondent. In this writ petition, the petitioner assails the first respondent Bank''s efforts to bring the petitioner''s property to sale for the realisation of the amounts owed by the additional eighth respondent, the erstwhile owner.

2. As the record reveals, the additional eighth respondent, while working as an Attendar in the respondent Bank, faced a serious charge of misappropriation; it has led to his dismissal from service. For the recovery of the misappropriated amount, the respondent Bank filed A.R.C. No. 968/1999 and obtained an award dated 10.12.2003 against the additional eighth respondent. At the inception, the respondent Bank also had the property attached through Exhibit R1(f) order dated 19.01.2000 passed by the Joint Registrar.

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3. On the strength of the award obtained by the respondent Bank, when it issued Exhibit P13 sale notice; the petitioner has approached this Court.

4. The learned counsel for the petitioner has submitted that the additional eighth respondent purchased an extent of two cents of land through Exhibit P15 registered sale deed dated 17.04.1980; later, on 03.01.1992 through Exhibit P16, another registered sale deed, he purchased an extent of 3.50 cents from the same vendor. According to the learned counsel, the additional eighth respondent is, therefore, the owner of 5.50 cents of immovable property.

5. The learned counsel has also submitted that initially the additional eighth respondent mortgaged the entire extent of land and obtained a housing loan from the Kerala State Housing Board. In the course of time, having cleared the loan, he got the property released by the Housing Board through Exhibit P2 release deed. The petitioner, through Exhibit P1 dated 30.12.2005, contends the learned counsel, purchased an extent of 2.5 cents, on which a residential house also stands.

6. Under the above factual backdrop, the learned counsel has strenuously contended that if at all the respondent Bank wants to realise the award amount, it should proceed against the balance extent of land : three cents.

7. In further elaboration of his submissions, the learned counsel has contended that while purchasing the land, the petitioner did take every precaution including that of obtaining an encumbrance certificate from the registrar''s office to ensure that the property had not been encumbered or distrained. He has also contended that after having the attachment through Exhibit R1(f) order, the respondent Bank ought to have communicated it to the registering authorities, apart from notifying the same in a conspicuous place with a view to disseminating the information as regards the order of attachment. He has also submitted that even the revenue records did not reveal the factum of attachment.

8. In sum and substance, the learned counsel for the petitioner has submitted that the petitioner is a bona fide purchaser without having any knowledge as regards any possible defect in the title of the additional eighth respondent and that the petitioner''s property cannot be brought for sale.

9. The learned counsel for the respondent Bank, on the other hand, has submitted that, as could be seen from Exhibit R1(b), the revenue record abstract obtained by the respondent Bank, the additional eighth respondent has got the title only to an extent of 2.5 cents. According to him, the rest of the land may have been under his occupation, but without any valid title.

10. Concerning the mortgage of the entire property and later its release through Exhibit P2 by the Housing Board, the learned counsel would contend that the act of the Housing Board in accepting the whole property under mortgage, though it did not belong to the additional eighth respondent, does not bind the respondent Bank.

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11. The learned counsel has further submitted that in the absence of any statutory mandate that Exhibit R1(f) order of attachment should be communicated either to the registration officials or the revenue officials, the order does not get vitiated; nor is it derogated from its enforceability on the grounds that the said authorities have not been communicated.

12. The learned counsel has also contended that the concept of bona fide purchaser does not apply to a purchase in violation of a statutory interdiction. In the end, the learned counsel has summed up his submissions that the petitioner and the additional eighth respondent being the son and the father are in collusion with each other and orchestrated Exhibit P1 sale deed only to defeat the respondent Bank''s right to realise its legitimate dues, which are public money.

13. Heard the learned counsel for the petitioner and the learned counsel for the respondent Bank, apart from perusing the record.

Issues:

I. In the face of Exhibit R1(f) Order of Attachment Before Judgment (ABJ), whether a purchaser without knowledge thereof can be termed as a bona fide purchaser?

II. Whether Exhibit R1(f) order has been vitiated for want of prior intimation to the registering and revenue authorities?

III. Whether the Decree Holder is bound to exclude the property purchased by a third party from the attached property if the balance property is sufficient to satisfy the decretal debt?

Issue No. I:

14. Protection of a creditor from the exploits of the debtor is an equitable measure having its roots in Common Law: One of the methods in equity of securing the creditor''s interest is by way of attachment of the debtor''s property. Though the received jurisprudential wisdom shows that the Common Law and Law of Equity are fundamentally, technically different, by the time they reached the Indian subcontinent from the Anglo-Saxon annals, the distinction still maintained in theory, if not in practice, in England stood obliterated.

15. This protective measure in equity stands statutorily recognised, among other areas, in Section 64 of the Code of Civil Procedure. The provision declares that a private alienation of property after attachment is void as against the claims enforceable under the attachment--though not against any other claim. The corollary to the statutory mandate is that the attaching decree-holder can proceed against the property attached as if there were no alienation or encumbrance subsequent to the attachment. The purchaser, therefore, even if bona fide, cannot be said to be a person independently interested in the property.

16. It is pertinent to observe that, short of creating a charge, lien, or title over the property, the attachment has the legal implications analogous to the doctrine

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of lis pendens: It merely prevents a private alienation of the property attached. Further, Section 64 of CPC, as is well settled, does not distinguish between attachment after judgment and that before judgment.

17. In T.G. Ashok Kumar v. Govindammal , (2010) 14 SCC 370, the Apex Court has taken due note of the hardships faced by bona fide purchasers of property lis pendens or under attachment. Their Lordships have held that a purchaser suffers hardship, loss, anxiety, and unnecessary litigation on account of the absence of a mechanism for him to verify whether a property is subject to any pending suit or a decree or attachment. At present, a prospective purchaser can easily find out about any existing encumbrance over a property either by inspection of the registration registers or by securing a certificate relating to encumbrances (that is, copies of entries in the registration registers) from the jurisdictional Sub-Registrar under Section 57 of the Registration Act, 1908. But a prospective purchaser has no way of ascertaining whether there is any suit or proceeding pending [or any attachment] in respect of the property, if the person offering the property for sale does not disclose the information or deliberately suppresses it.

18. The Apex Court has further observed that as a result of suppression by the vendor, after parting with the consideration (which is many a time the lifetime savings), the purchaser gets the shock of his life when he comes to know that the property purchased by him is subject to litigation and that it may drag on for decades and ultimately deny him title to the property. The pendente lite purchaser will have to wait for the litigation to come to an end, or he may have to take over the responsibility of conducting the litigation if the transferor loses interest after the sale.

19. The purchaser may also face objections to his being impleaded as a party to the pending litigation on the ground that being a lis pendens purchaser, he is not a necessary party. All these inconveniences, risks, hardships and misery could be avoided and the property litigations could be reduced to a considerable extent, if there is some satisfactory and reliable method by which a prospective purchaser can ascertain whether any suit is pending (or whether the property is subject to any decree or attachment) before he decides to purchase the property.

20. In the end, the Apex Court has hoped that the Law Commission and Parliament consider a suitable statutory amendment to cover the existing void in title verification or due diligence procedures. A provision can also be made for compulsory registration of such notices in respect of decrees and in regard to attachments of immovable properties--thus desired the Apex Court.

21. Indeed, this Court too, taking its cue from the Apex Court, does hope that there may soon be some statutory mechanism in place to protect the interests of, especially, bona fide purchasers by way of title verification even in the case of properties, say, under attachment, litigation, decretal title declarations.

22. After all is said and done, indisputably under the present statutory dispensation there is no provision that compels a suitor who has obtained an

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attachment, before or after the judgment, to intimate either the registration authorities or revenue authorities; nor can it be said that such judicial directive as attachment requires any publication or dissemination. Hardship either because of law or, conversely, because of absence of law as a remedial measure, cannot be a ground to avoid the legal consequences which in themselves are unexceptionable. Securing the statutory shortcomings is in the domain of the Legislative wisdom--not of judicial activism.

23. Indeed, the petitioner did purchase an extent of 2.5 cents of immovable property on 30.12.2005 through Exhibit P1 from none other than his father, the additional eighth respondent. Despite the respondent Bank''s contention to the contrary, this Court is inclined to hold that just because the petitioner has purchased the property from his father, his entitlement to the same cannot be derogated from on the premise of their close kinship. Contractually speaking, they are two independent juridical entities capable of validly contracting and having the property conveyed from one to the other.

24. The question, however, is whether the petitioner has purchased any encumbered property. In other words, whether the petitioner''s plea of bona fide purchaser can be sustained. As can be seen, Section 78(c) of the Kerala Cooperative Societies Act empowers the Registrar or his delegate to attach and sell the property for realisation of the award debt. Further, Rule 93 of the Kerala Co-operative Societies Rules amply provides for attachment before judgment. It is pertinent to observe that neither the award obtained by the respondent Bank nor Exhibit R1(f) order of attachment before judgment is under challenge. The natural corollary is that the petitioner''s purchase of the property subsequent to the order of attachment subordinates his right.

Issue No. II:

25. Though the learned counsel for the petitioner has made strenuous efforts to hammer home his contention that the petitioner is a bona fide purchaser and that neither the respondent Bank nor the attaching officials have duly notified the registrar and the revenue officials about the attachment, I am afraid, the said contention cannot be countenanced. In the absence of any statutory compulsion, this Court cannot dilute the binding nature of Exhibit R1(f) order of attachment on the mere premise that it was not communicated to the registrar and revenue officials. It is too well established to be caviled about that the attachment before judgment encumbers the property and any subsequent purchase, bona fide though, gets its title with encumbrance fastened to the said property.

26. In the absence of any provision akin to Section 19 of the Specific Relief Act, the concept of bona fide purchaser cannot be brought into proceedings which are in invitium. In State of Travancore v. Bank of Cochin , AIR 1954 TC 243, a learned Full Bench has held that if the judgment-debtor alienates the property contrary to the attachment, such alienation would be ineffective and void. An attaching creditor obtains by the attachment a right to have the attached

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property kept in custodia legis for the satisfaction of his debt and a subsequent dealing with that property by the judgment-debtor cannot defeat that right. Accordingly, this Court cannot but hold that the petitioner''s plea of his being a bona fide purchaser does not come to his rescue as the said plea is statutorily impermissible.

Issue No. III:

27. In the face of the attachment that has remained in force unchallenged, it does not lie in the mouth of the petitioner to insist that the respondent Bank shall proceed against the remaining property of the additional eighth respondent. On the contrary, the said option is open for the petitioner to get compensated by the additional eighth respondent for the loss he has suffered having purchased an encumbered property. In other words, the petitioner can exercise his right of lien or charge over the remaining property of the additional eighth respondent and get adequately compensated in that process. As has already been adverted to, the mere fact that the petitioner and additional eighth respondent are son and father does not affect their jural relationship, much less their contractual commitments.

28. Before parting, I may have to observe, to the credit of the respondent Bank, that its learned counsel has all through represented that the Bank is willing to accommodate the petitioner by letting him to pay the award amount in instalments, so that he could save the property. The learned counsel for the petitioner, on the other hand, has submitted that the petitioner, when contacted, has expressed his inability to repay the award amount.

In the facts and circumstances, I do not find any legal infirmity in Exhibit P13 sale notice issued by the respondent Bank. Accordingly, this Court dismisses the writ petition leaving it open for the respondent Bank to proceed further for realisation of its award amount in accordance with law.

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