MANU/BH/0076/1969

Equivalent Citation: AIR1969Pat299, 1969()PLJR70

IN THE HIGH COURT OF PATNA
FULL BENCH

A.F.A.D. No. 462 of 1965

Decided On: 20.12.1968

Appellants:**Tapeshwar Missir**
Vs.
Respondent:**Santokh Singh and Ors.**

Hon'ble Judges/Coram:
S.C. Mishra, C.J. R.K. Choudhary and Udai Sinha, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Kailash Roy, Shreenath Singh, Tarini Prasad, Yashavant Sahay Varma and Ram Nandan Singh, Advs.

For Respondents/Defendant: J.C. Sinha, Ashwini Kumar Sinha and Madan Mohan Varma, Advs.

JUDGMENT

S.C. Mishra, C.J.

1. This appeal arises out of a suit under Order 21, Rule 103, Code of Civil Procedure, in which the plaintiff-appellant sought a declaration that he was entitled to possession of the house bearing municipal holding no, 3 of Ward No. 4, and Khas Mahal holding No. 517, Mohalla Thakurbari Road in the town of Dalton-ganj. Khas Mahal holding No. 517 stood recorded originally in the name of Shital Prasad. His further prayer was that it should be declared that Santokh Singh (defendant No. 1) had no right to resist the delivery of possession in favour of the plaintiff. Mt. Jitan Kuer (defendant No. 2) claimed to have title to this house under a sale deed executed in her favour by her uncle Shital Prasad. Shital Prasad died and Mt. Jitan Kuer started a probate case (no. 31 of 1951) in the Court of the Judicial Commissioner Chotanagpur. The application for probate made by Jitan Kuer was resisted by Dinesh Prasad nephew of Shital Prasad. This gave rise to a title suit between them being Title Suit No. 5 of 1952. Probate was, however, granted to Jitan Kuer on the 1st of May, 1956.

2. Jitan Kuer and others borrowed some money from the plaintiff, Tapeshwar Missir, for which he had to institute Money Suit No. 256 of 1952 in the Court of the Munsif of Palamu. The suit was decreed by the trial court but in appeal the decree of the trial Court was modified Inasmuch as the decree stood only against Mt. Jitan Kuer and Dinesh Prasad. While Money Suit No. 256 of 1952 was still pending, the plaintiff prayed for an order of attachment before judgment and the trial Court ordered it to be issued on the 2nd of July, 1952, and an ad interim order of attachment was issued thereafter. According to the plaintiff, this order of attachment was subsequently made absolute.

3. The decree obtained by plaintiff Tapeshwar Missir was put into execution by an

application dated the 4th of January 1954, which resulted in Execution Case No. 2 of 1954. In execution of the decree, the property in suit was sold at auction to satisfy the decree of the plaintiff and the plaintiff purchased it on the 1st of February, 1955, for a sum of Rs. 500/-.

4. The plaintiff after having purchased the house at auction sale proceeded to take delivery of possession through Court and in course of that proceeding an application was filed by defendant No. 1 Santokh Singh on the 15th of May 1956, both under Section 47 and Order 21, Rule 90, Code of Civil Procedure, for setting aside that auction sale, stating that he purchased the house from Mt. Jitan Kuar under registered sale deed dated the 16th of January, 1953. This gave rise to Miscellaneous Case No. 103 of 1956. It was, however, dismissed on contest on the 25th of September, 1956. The auction sale was confirmed thereafter and the sale certificate was prepared and sealed on the 9th of April 1957. It may be stated that the prayer for delivery of possession was made after the sale was confirmed in the circumstances set out above. Defendant No. 1 Santokh Singh once more resisted the delivery of possession. The plaintiff filed an application thereafter under section 74 Code of Civil Procedure, read with Order 21, Rule 97, Code of Civil Procedure, for granting delivery of possession putting defendant No. 1 in civil prison. This gave rise to Miscellaneous case No. 64 of 1957. Defendant No. 1 Santokh Singh, however, came in Civil revision to the High Court against the order allowing the plaintiff to come in possession of this house. The High Court, however, reversed the order of the trial Court and the prayer of the plaintiff, Tapeshwar Missir, for delivery of possession was rejected. The High Court observed that it was open to the plaintiff, Tapeshwar Missir, to institute a Civil suit to assert his right to obtain delivery of possession of the house,

5. The plaintiff's claim rested on the ground that the sale deed in favour of Santokh Singh (defendant No. 1) was a farzi and sham transaction and it was brought into existence for the purpose of shielding the house from sale in execution of the decree obtained in Money Suit No. 256 of 1952. No delivery of possession after the transfer of title was made in favour of Santokh Singh (defendant No. 1) inasmuch as he had been in continued possession of the house from before as a tenant. Moreover, a miscellaneous case having been started, which was under Order 21, Rule 90, and Section 47 Code of Civil Procedure, in which order was passed against him and he not having gone up in revision or appeal against that order it was not open to him to resist the claim of the plaintiff for delivery of possession.

6. The learned Munsif passed a decree in favour of the plaintiff holding that the sale deed in favour of defendant No. 1 was a sham and collusive transaction. No consideration passed in favour of defendant No. 1 and as such the plaintiff was entitled to obtain delivery of possession dispossessing defendant No. 1, who acquired no title under the sale deed. It may be stated that defendant No. 2 (Mt. Jitan Kuer) in her written statement supported the case of the plaintiff. Her stand was that defendant No. 1 succeeded in persuading her to execute a sale deed in respect of the house on the assurance that her right, title and interest would not be affected by the transaction and that it would enable her to save the house from the clutches of her creditor, Tapeshwar Missir. Her further case was that the sale deed was executed by her without it being read out to her; that she was a pardanashin lady and that she could not take the advice of her friends and relations. Moreover, the whole transaction was rushed through with great hurry by defendant No. 1 who was proceeding in the matter fraudulently. The sale deed was in her possession for some time when defendant No. 1 managed to have it handed over to him on the plea that he required it to consult some lawyer. As to the case of the plaintiff that the property

was attached before judgment during the pendency of Money Suit No. 256 of 1952, it was accepted and as such any sale deed in favour of defendant No. 1 by defendant No. 2 would not put him in a better position than the judgment-debtor herself.

7. On appeal, the learned Subordinate Judge has reversed the finding of the learned Munsif on almost all the substantial questions. He has come to the conclusion that the sale deed in favour of defendant No. 1 by defendant No. 2 was genuine and valid transaction and that Rs. 3,000/-, as the consideration mentioned in the sale deed, was paid by him. The alleged notice of attachment before judgment was not shown to have been served on defendant No. 1 and as such the genuine sale deed in favour of defendant No. 1 in respect of the house in 1953 could not be affected by the subsequent auction sale of it at the instance of the plaintiff when he purchased it in execution of his decree for a sum of Rs. 500/-.

8. Before, however, any other question relating to the correctness of the judgment of the learned Subordinate Judge is taken up, it may be relevant to deal with the point on which there is some conflict of views in two decisions of this Court. The learned Single Judge referred the question for decision by the Division Bench and the Division Bench, in its turn, has referred the matter to a larger Bench which is being considered by us in this reference. The point referred to is as to which of the two views, the one expressed in Sadhu Prasad Sah v. Satnarain Sah MANU/BH/0239/1938 : AIR 1939 Pat 81 and Harihar Pandey v. Vindhyachal Rai MANU/BH/0236/1948 : AIR 1949 Pat 170 Appeals Nos. 140 of 1956, Sm. Savitri Devi v. Bank of Bihar, Ltd. and 119 of 1957 Bank of Bihar v. Sheo Kumari Devi, D/- 5-2-1962 (Pat) on the other, is valid. The first set of cases referred to above have taken the view that there can be no attachment before judgment of any property if the notice of attachment is issued under Order 38, Rule 5, Code of Civil Procedure in form No. 5 (Appendix F of the Code) because in order to be valid attachment of the immovable property, notice should be issued under Order 21, Rule 54 in form No. 24 (Appendix E of the Code) and the latter cases are to the contrary. The fact is not denied that in the present case the notice of attachment was in form No. 5 (Appendix F) which runs thus:--

> "To
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> The Bailiff of the Court.
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> Whereas .....has proved to the satisfaction of the Court that the defendant in the above suit ..... These are to command you to call upon the said defendant ..... on or before the ..... day of .....19 ..... either to furnish security for the sum of Rupees ..... to produce and place at the disposal of this Court when required...or the value thereof or such portion of the value as may be sufficient to satisfy any decree that may be passed against him, or to appear and show cause why he should not furnish security: and you are further ordered to attach the said ..... and keep the same under safe and secure custody until the further order of the Court; and you are further commanded to return this warrant on or before the ..... day of .....19 ..... with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed.
>
> Given under my hand and the seal of the court, this .....day of ..... 19....."

This form does not contain any prohibition restraining the defendant from

transferring or charging the property attached so as to prejudice the right of the plaintiff which may have to be enforced in execution of the decree obtained in the suit. Order 38, Rule 7, however, runs thus:--

> "Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of the property in execution of a decree'.

This rule, therefore, provides that in order to make attachment before judgment valid, attachment must be issued in the form in which it will be issued when attachment is necessitated in course of execution of a decree. It may be stated that Order 21. Rule 42, onwards, up to Rule 57, deals with attachment. Rule 43 of this Order deals with the manner of attachment of movable property other than agricultural produce and its custody while the subsequent rules deal with the attachment of specific forms of movable property such as agricultural produce etc, and their custody. Rule 54 of Order 21, which is really material, lays down as follows:--

> "54(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.
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> (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."

The moot point for consideration is whether it is necessary in all cases before immovable property can be bound with the attachment taken out in a case of attachment before judgment, that the order must prohibit the judgment-debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge. Form No. 24 of Appendix E also contains a similar prohibition which may be usefully quoted here :--

> "To
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> Whereas you have failed to satisfy a decree passed against you on the ..... day of ..... 19 ..... in suit no ..... of 19 ..... in favour of ..... for ..... It is ordered that you, the said ..... be, and you are hereby prohibited and restrained until the further order of this Court, from transferring or charging the property specified in the schedule hereunto annexed by sale, gift or otherwise, and that all persons be, and that they are hereby prohibited from receiving the same by purchase, gift or otherwise. Given under my hand and the seal of the Court, this ..... day of ..... 19 ....."

The Division Bench, as referred to above, have taken view that it is peremptory that the form prescribed by the Code of Civil Procedure under Order 21, Rule 54, being form No. 24 of Appendix E, must be observed before the property can be taken to bear the liability arising from service of notice of attachment before judgment. Order 38, Rule 7, is in clear terms and, therefore, the view of the Division Bench referred to above must be taken to be prima facie correct, Mr. Kailash Roy has, however, contended that the view of the Division Bench in the aforesaid two first appeals (First

Appeal nos. 140 of 1956 and 119 of 1957 (Pat)) lays down the law correctly, because their Lordships have expressed the opinion that a punctilious observance of form No. 24 of Appendix E is not necessary since that form refers to the fact that the judgment-debtor has failed to satisfy the decree, whereas under Order 38, Rule 5, attachment is issued before judgment Hence, form No. 24 of Appendix E cannot be the proper form for making the property liable. The distinction sought to be made by the Division Bench in the above two first appeals cannot be taken to be valid distinction inasmuch as Order 38, Rule 7, in terms provides that the manner of attachment must be the same as in regard to the attachment of property in course of execution of a decree which will attract the operation of Rule 54 of Order 21 in case of immovable property. Mr. Kailash Roy has contended that the manner of attachment would be only with reference to Clause (2) of Rule 54 of Order 21, which provides that 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.

In my opinion, however, It Is difficult to accede to this contention. The manner of attachment is not only provided in Clause 2 of Rule 54 but it is also provided in Clause 1 of this rule which makes it obligatory for the Court to pass 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. Where this is not done, it must be held that the manner of attachment is not the one prescribed in Rule 54 of Order 21, which, is relevant in determining whether an attachment before a judgment is valid or not. As a matter of fact, the form prescribed under Order 38, Rule 5, is a supplemental form, and it may be applicable to a case which is not clearly covered by Rule 43 or Rule 54 of Order 21. If it were a case of conflict only between form No. 5 of Appendix F issued under Order 38, Rule 5, of the Code of Civil Procedure, and form No. 24 of Appendix E issued under Order 21, Rule 54, of the Code of Civil Procedure, the point was arguable that specific provision under Order 38, Rule 5, might be taken to prevail over form No. 24 of Appendix E. As it is, however, there is positive provision in Rule 54 itself, the language of which has been incorporated in form No. 24 of Appendix E, making it clear that the order must specifically prohibit the judgment-debtor from transferring or charging the property and likewise the form to be applicable in issuing notice under Order 38, Rule 5, should be so that the defendant must be specifically prohibited from transferring or charging the property in any manner, and all persons from taking any benefit from such transfer or charge. The alteration in form No. 24 of Appendix E should be mutatis mutandis with slight variation and not that the essential ingredient of Rule 54 is to be completely ignored. The policy of the Legislature is obvious in enacting this ingredient in Rule 54 of Order 21, so that notice may be given both to the judgment-debtor or the defendant, for the matter of that, as also to the purchaser or any person taking any benefit under the transaction, that after the attachment both transferring and charging and taking any benefit from such transfer or charge will be invalid in law. It is not only a formal procedure and cannot be ignored.

In my opinion, therefore, the decision of this Court in the case of Sadhu Prasad MANU/BH/0239/1938 : AIR 1939 Pat 81 and Harihar Pandey MANU/BH/0236/1948 AIR 1949 Pat 170 is correct and the decision of the Division Bench in the two unreported first appeals referred to above, in so far as this point is concerned, must be. held to be incorrect. It is true, no doubt that in issuing notice of attachment before judgment in form No. 5 of Appendix F under Order 38, Rule 5, a party is not

to blame and it is the duty of the Court itself to be circumspect that form No. 24 of Appendix E is used putting the word "defendant for the word "judgment-debtor" so that the suing plaintiffs may not suffer on account of any lacuna on the part of the court although the matter is not free from difficulty. But unless the proper form under Order XXI, Rule 54 of the Code of Civil Procedure, is used and the defendant or judgment-debtor is restrained from transferring or otherwise charging the property, the attachment made cannot have the effect of restraining him from doing so.

9. In the result, therefore, the judgment of the court of appeal below must be upheld as correct and the appeal dismissed. In the peculiar circumstances of the case, however, the parties must bear their own costs throughout.

R.K. Choudhary, J.

10. I agree.

Udai Sinha, J.

11. I agree.