

Before K. Kannan, J.

MAHENDER KUMAR—Petitioner

versus

MANGAL SINGH—Respondent

C.R. No.6430 of 2012

March 19, 2013

Constitution of India, 1950 - Art. 227 - Civil Procedure Code, 1908 - S.60(1) (ccc) inserted by Punjab Amendment - Defence set up by judgment debtor before executing court was that property sought to be attached was a residential house, and as per S.60(1)(ccc) inserted by Punjab Amendment, could not be attached - Objection accepted - Challenged in Revision Petition - Decree sought to be executed was a compromise decree in a suit for specific performance wherein it was agreed that balance amount could be recovered by way of auction of the house in question - Thus, house was specifically charged with debt sought to be recovered -Held, that no protection could be granted to the judgment debtor under proviso to S.60(1)(ccc) - Order of executing court set aside, and property ordered to be sold in execution of decree -Revision Petition allowed.

Held, that the decree, which is sought to be executed was the compromise decree in a specific performance suit. The suit for specific performance at the instance of the decree holder was in relation to the residential house agreed to be sold by the defendant to the plaintiff. The parties entered into a compromise on 07.01.2004 allowing for the defendant to pay Rs.66,000/- to the plaintiff in installment of Rs.2000/- per month and the compromise specifically recites, "till then the defendant will not sale, mortgage the house in question to anybody and the charge shall remain created on the house and if the defendant failed to pay the installment in time then the plaintiff has right to file the execution application before the Court for recovery of the balance amount....." Towards the end the document also reads that the plaintiff will have also the right to recover the balance amount by way of auction of the house in question. When there is a reference specifically made in the compromise that a charge was being created on

the property for the liability, which the defendant had undertaken then it is to be seen whether it falls within the proviso mentioned under Section 61(1)(ccc). The proviso would require to be reproduced which reads as follows:-

"Provided that the protection afforded by this clause shall not extend to any property specifically charged with the debt sought to be recovered."

In my view, the recital extracted from the compromise decree squarely falls within the proviso and the protection which the defendant was asking was simply not available to him.

(Para 2)

Sanjiv Gupta, Advocate, *for the petitioner*:

Jatin Hans, Advocate for Vaibhav Sehgal, Advocate, *for the respondent*.

K. KANNAN J. (ORAL)

(1) The revision petition is directed against the proceedings for attachment and sale of the property, which is admittedly residential house of the judgment debtor. The defence by the judgment debtor is that in terms of Section 60 (1) (ccc) of the Code of Civil Procedure by the Punjab Amendment, one main residential house and other buildings attached to it belonging to a judgment debtor other than an agriculturist and occupied by him, shall be protected from attachment. The contention is that since the property sought to be attached is a residential house, protection of the State amendment avails to a judgment debtor. This objection was accepted and the attachment sought by the decree holder was denied. It is against this order of the Executing Court that the revision has been filed.

(2) The decree, which is sought to be executed was the compromise decree in a specific performance suit. The suit for specific performance at the instance of the decree holder was in relation to the residential house agreed to be sold by the defendant to the plaintiff. The parties entered into a compromise on 07.01.2004 allowing for the defendant to pay Rs. 66,000/- to the plaintiff in installment of ' 2000/- per month and the compromise specifically recites, "till then the defendant will not sale, mortgage

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“Provided that the protection afforded by this clause shall not extend to any property specifically charged with the debt sought to be recovered.”

In my view, the recital extracted from the compromise decree squarely falls within the proviso and the protection which the defendant was asking was simply not available to him.

(3) A faint argument is made on behalf of the judgment debtor that the compromise is required to be registered and it was not so registered. Section 17 (2) (vi) of the Registration Act, 1908 reads as follows:-

“(vi) any decree or order of a Court [except a decree or order expressed to be made on a compromise and comprising immovable property other than than which is the subject matter of the suit or proceeding].”

This Section requires only a registration of compromise, which is not the subject matter in respect of which a right is created for the first time through the decree. In a suit for specific performance where the immovable property in dispute was ultimately allowed to be retained by the judgment debtor with a charge created thereon, it cannot be said to be a property which is not the subject matter to which the above provision of the Registration Act is applicable. The plea therefore that the decree was required to be registered is erroneous and rejected.

(K. Kannan, J.)

(4) Learned counsel appearing for the respondent also argues that when the decree was passed it was merely a decree for money and the charge which existed prior to the decree was no longer available under the decree. It is clear misreading of the terms of compromise on the basis of which a decree also came to be passed. A decree that forms the compromise must be understood as providing for everything that the compromise itself provides for unless the compromise terms are unworkable or against public policy. The parties were bargaining for a compromise with their eyes open and when the judgment debtor had provided that he will not mortgage or sell the property and that a charge was being created and if any money was not paid the property could be sold, the party definitely understood that the charge was being created on the property. Even otherwise a charge on the property, which is agreed to be sold that ultimately does not go through to allow for the vendor to secure the money back obtains to him also a statutory charge under Section 55(4) (b) of the Transfer of Property Act. The charge which the statute recognizes becomes also a charge under the decree when vendor was bargaining for return of the money which he had advanced.

(5) In this case when the decree holder was enforcing a charge all that was necessary was to seek for a final decree and for the sale of the property. It was not even necessary that fresh proceedings for attachment was to be made. It was a surplusage and if the party was executing to the same, the judgment debtor does not obtain a right to contend that the property could not be sold.

(6) There is yet another argument that the defendant has made namely that some payments to the plaintiff under the decree have not been given credit. The compromise terms themselves specify that payment shall be duly receipted. If there is any payment pursuant to the decree, it shall be a payment in the manner contemplated under Order 21 Rule 1 and they have to be duly certified in the manner contemplated by law. If proof of payment exists but they are uncertified, it will give an independent right to judgment debtor to seek for recovery and it cannot be made a subject of discharge or set off for the judgment debtor against the decree holder.

(7) Learned counsel also contends that Section 60(3) protects a judgment debtor from waiving any of the rights which were guaranteed under this provision. The waiver which law contemplates is waiver which

has nothing to do with the section itself. If the Section admits of a proviso and excepts a charge which is created on a property, the statutory exception does not require any waiver. The enforcement obtained through a right which the decree holder has, does not depend on the alleged waiver of the judgment debtor. The plea that he cannot be permitted to waive is equally without merit and it is also rejected.

(8) The impugned order is set aside. The civil revision is allowed and the property shall be directed to be sold for recovery of the money which is still payable.

P.S. Bajwa