

such an order as he thinks fit respecting the disposal of property seized by the police on suspicion that the same is stolen one. It is true that the scope of an inquiry is restricted to the determination of the question of right to possession and not to ownership and that normally the property is returned to the person from whom it is seized. What is a proper order to be passed, however, depends on the facts and circumstances of each case and some time the matter of ownership cannot be completely divorced from that of possession. An order under section 523 is not a final adjudication of the rights of the parties with respect to the property so seized and they can have their title declared thereto by a civil Court. In the instant case, there was no dispute as to title since the civil Court had already declared it to vest in M/s. Inter-continental Agencies Private Limited. The buses had been taken by M/s. Sandhu Roadways Private Limited under a hire-purchase agreement and it is not known whether by default, if any, in regard to payment of the instalments they had forfeited their right to possession. No evidence was produced by the petitioners to show that they had a right to possession and the Magistrate rightly exercised his discretion in ordering the custody of the buses to be handed over to the owners.

(6) In the result, the revision petition stands dismissed.

N.K.S.

REVISIONAL CIVIL

Before H. R. Sodhi, J.

MOHINDER SINGH, ETC.,—*Petitioners.*

versus

NANAK SINGH, ETC.,—*Respondents*

Civil Revision No. 506 of 1970.

November 11, 1970.

Code of Civil Procedure (V of 1908)—Sections 64 and 115 Order 21, rules 58, 59, 60, 61 and 63 and Order 38 rule 10—On objection under rule 58, the executing Court allowing conditional release of property under attachment—Revision petition against the order of imposition of condition—Whether maintainable—Judgment-debtor entering into an agreement to sell his property before its attachment in execution of the decree against him—Such contractual obligation—Whether prevails over the attachment.

Mohinder Singh, etc. v. Nanak Singh, etc. (Sodhi, J.)

Held, that in proceedings under Order 21 rule 58, Code of Civil Procedure, relating to the investigation of claims, it is the liability or non-liability of the property to attachment that is to be determined and not whether any condition for the release of the property under attachment has to be imposed or not. As soon as the executing Court upon investigation is satisfied that the property when attached was in possession of the objector on his own account, it has got to release from the attachment and no questions of legal right and title are to be determined. If the executing Court imposes a condition on the release of the property from attachment, the order is not contemplated by rules 58 to 61 of Order 21 of the Code, and no appeal lies against that order. A revision petition will, therefore, be competent against the order subject to the conditions of section 115 of the Code being satisfied. The provisions of Order 21 rule 63, cannot be pleaded as a bar to such a petition because the order does not fall under rule 58 of Order 21 of the Code. It is only an order under Order 21 rule 58 that becomes conclusive if no suit under Order 21 rule 63 is brought. (Para 3)

Held, that no doubt it is the right, title and interest of the judgment-debtor that is attached but mere agreement to sell does not detract from any of the incidents of ownership nor does it create any interest in or charge on the property. The interest in the property will be transferred only when actual deed of conveyance is executed. The right to have the contract of sale specifically enforced cannot be equated with a sale. Even if the possession is transferred and beneficial enjoyment given to the prospective purchaser, the legal ownership still remains with the party promising to sell. Under section 64 of the Code, no private transfer or delivery of property is allowed to take effect against interests of the attaching creditor after it has been attached. The basic idea of placing on immovable property under attachment is to prohibit the judgment-debtor from transferring or charging the same in any way and no third party can take benefit from such transfer or charge as enjoined in Order 21 rule 54 of the Code. Section 64 is intended for the protection of the attaching creditor only, who has taken out execution. Sale in pursuance of a previous agreement to sell is a private alienation of property which is void as against the claims of the attaching decree-holder. Hence an agreement to sell his property entered into by a judgment-debtor does not prevail over the subsequent attachment of the property in execution of the decree against him. (Para 5)

Petition under section 115 of the Civil Procedure Code, for revision of the order of Shri M. S. Labana, Sub-Judge, 1st Class, Ludhiana, dated the 27th April, 1970, accepting the objection petition and ordering the release of the property from attachment subject to the condition that the unpaid sale price of Rs. 3,000 will be paid by the objectors to the decree-holder respondent within two months from the date of this order else this amount can be recovered by the decree-holder respondent by putting the property in question or a part thereof to sale and the amount of Rs. 3,000 will be deemed to be charge on this property in favour of the decree-holder.

KRISHAN LAL KAPUR, ADVOCATE, for the petitioners.

RAM LAL AGGARWAL, ADVOCATE, for the respondent.

JUDGMENT

SODHI, J.—(1) Nanak Singh, decree-holder respondent, obtained a money decree against Jagdish Chander judgment-debtor respondent. An execution was taken out by the decree-holder and a plot of land got attached on 7th October, 1969. Before the attachment took effect, Jagdish Chander had already executed an agreement to sell the same plot to the petitioners, Mohinder Singh and Balwant Singh, for a sum of Rs. 22,500 and delivered possession of the same to them. In execution proceedings, objections were filed by the petitioners under Order 21, rule 58, Civil Procedure Code, it being pleaded by them that the property under attachment, though originally belonging to the judgment-debtor, was possessed by them in their own right and, therefore, not liable to attachment and sale. The only issue framed by the executing Court was to the following effect :—

“Whether the objectors are in possession of the property under attachment in their own right as claimed ?”

It was conceded on behalf of the objectors that the agreement executed in their favour did not create any interest in the property agreed to be sold in terms of section 54 of the Transfer of Property Act, 1882, but the contention was that the objectors had taken possession of the property and the only question to be determined, as envisaged under Order 21 rule 59, was whether they were possessed of it in their own right or not. Evidence was adduced by the objectors to prove execution of the agreement and also to show that they had paid a sum of Rs. 19,500 to Jagdish Chander, judgment-debtor, out of the total consideration of Rs. 22,500 and that only a balance of Rs. 3,000 remained to be paid at the time of registration of the sale-deed. Receipt Exhibit O2, evidencing payment of Rs. 18,500 was duly got proved and it was not disputed that Rs. 1,000 had been paid earlier. Out of Rs. 18,000 a sum of Rs. 13,000, as disclosed by the evidence, was meant to be paid to the Industries Department towards the loan due from the judgment-debtor.

(2) The executing Court on an appraisal of the evidence came to the conclusion that the objectors, now petitioners, were in possession of the plot in dispute prior to the attachment as prospective vendees. In this view of the matter, the property was directed to be released from attachment but a condition was imposed on

the objectors that release would be operative only on payment of the unpaid sale price of Rs. 3,000 to the decree-holder respondent. It is against this direction that a revision petition has been filed by the objectors.

(3) A preliminary objection has been raised by Mr. R. L. Aggarwal, learned counsel for the respondent, decree-holder, that no revision is competent. I am afraid the objection is without substance. The only provision of law that can be pleaded as a bar to the maintainability of the revision petition is Order 21 rule 63, Code of Civil Procedure, which provides that a party against whom an order is made on objections preferred under Order 21 rule 58 may institute a suit to establish the right which he claims to the property in dispute. But subject to the result of such a suit, if any, the order is to be conclusive. It is only the right that the decree-holder or the objector has to the property attached that can form the subject matter of the suit. An objector in proceedings relating to the investigation of claims and objections under Order 21 can only get an adjudication that the property itself is not liable to attachment. In other words, it is the liability or non-liability of the property to attachment that is to be determined and not whether any conditions for the release of the property under attachment are to be imposed or not. Rule 59 lays down the scope of the enquiry. All that a claimant or objector is required to show is that on the date of attachment he had some interest in or was possessed of the property attached. As soon as the executing Court upon investigation is satisfied that the property when attached was in possession of the objector on his own account, it has got to release the same from attachment and no questions of legal right and title are to be determined. If the executing Court passes an order which is not contemplated, by rules 58, 59, 60 and 61 of Order 21, and no appeal lies against that order, a revision will be competent subject to the conditions of section 115 being satisfied. The word 'conclusive' as appearing in Order 21 rule 63 has, therefore, to be read in this context. When an objector challenges the order of the type, as made in the instant case, where in spite of the finding that he is in possession in his own right the property is not released unconditionally, there is no right of appeal available to the objector. Section 115 prohibits the exercise of revisional jurisdiction by the High Court only if remedy by way of an appeal can be pursued, and the existence of an alternative remedy by suit under Order

21 rule 63, does not create any such bar. In my opinion, revision in such a case can be entertained if the pre-requisites for the applicability of Section 115 of the Code of Civil Procedure are otherwise found to exist.

(4) The order of the executing Court, to my mind, is wholly without jurisdiction and beyond the scope of the enquiry as envisaged in Order 21. The correctness of the finding to the effect that the objectors were possessed of the plot in their own right is not challenged by Mr. Aggarwal, learned counsel for the decree-holders, but he supports the impugned order it being urged by him that condition for payment of the unpaid sale price of Rs. 3,000 to the decree-holder could be validly imposed. I have not been able to persuade myself to accept this contention. The only plea of the objectors petitioners was that they were in possession of the attached property in their own right because of an agreement to sell having been executed in their favour and in pursuance of which they had paid the entire price except for a sum of Rs. 3,000. They claimed deductions out of Rs. 3,000 for electric charges and taxes paid by him. No enquiry to this effect was made by the executing Court. In case the decree-holder wanted to recover the unpaid price he could seek attachment of the money that lay in the hands of the objectors but in view of the finding that the objectors were in possession of the property in their own right the executing Court was bound under rule 60 of Order 21 to release the property from attachment without any conditions. The impugned order of the executing Court allowing the claim of the objectors conditional on payment of Rs. 3,000 was, therefore, wholly without jurisdiction and the property should have been released from attachment unconditionally. I am supported in the view taken by me by a Division Bench judgment of the Calcutta High Court reported as *Kamala Kanta Sen v. Durga Kumar Sen and others* (1). The executing Court, however, placed reliance on a Division Bench judgment of the Travancore-Cochin High Court in *Kochuponchi Varughese v. Ouseph Lonan* (2). The ratio of that case is twofold, firstly, that an agreement to sell immovable property though not creating an interest or charge on the property will prevail over subsequent attachment, and secondly, where subsequent to contract to sell certain property, that property is attached by the decree-holder,

(1) A.I.R. 1919 Cal. 473.

(2) A.I.R. 1952 Travancore Cochin 467.

and then a sale in pursuance of the contract takes place, the vendee is not a representative of the judgment-debtor within the meaning of section 47 of the Code of Civil Procedure. The approach made by the learned Judges in that case is the same as that adopted in some decisions of the Madras High Court and also of some other Courts. The earliest of the decisions following this view was *Madan Mohan Dey and others vs. Rebat Mohan Poddar and another* (3). It is not necessary to discuss all those cases and the view generally taken therein is that the agreement to sell created 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 said contract of sale. With utmost respect to the learned and eminent Judges, I cannot persuade myself to hold that such a contractual obligation would prevail over the attachment. The whole thing depends on the interpretation of section 64, Code of Civil Procedure, which is in the following terms :—

“64. 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.

Explanation.—For the purposes of this section claims enforceable under an attachment include claims for the rateable distribution of assets.”

Reference in this connection may usefully be made to Order 38, rule 10, Code of Civil Procedure, as well which provides that attachment before the judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit.

(5) No doubt it is the right, title and interest of the judgment-debtor that is attached, but mere agreement to sell does not detract from any of the incidents of ownership nor does it create any interest in or charge on the property. The interest in the property will be transferred only when actual deed of conveyance is executed and the right to have the contract of sale specifically enforced cannot be equated with a sale. Even if the possession is transferred

and beneficial enjoyment given to the prospective purchaser, the legal ownership still remains with the party promising to sell. The language of section 64 is most unambiguous and the object of this provision of law evidently is that no private transfer or delivery of property shall be allowed to take effect against interests of the attaching creditor after it has been attached. A transfer, if so made during the continuance of the attachment, is, therefore, declared to be void as against all claims enforceable under the attachment. The basic idea of placing an immovable property under attachment is to prohibit the judgment-debtor from transferring or charging the same in any way and no third party can take benefit from such transfer or charge as enjoined in order 21 rule 54, Code of Civil Procedure. Section 64 is intended for the protection of the attaching creditor only, who has taken out execution. Sale in pursuance of a previous agreement to sell is nonetheless a private alienation of property which shall be void as against the claims of the attaching decree-holder and not against other persons. The contrary view is based more on equitable considerations, which, in my opinion, are not warranted. Woodroffe, J., in *Madan Mohan Dey's case* (3) (*supra*) specially observed that purchase under the previous agreement to sell was permitted to prevail against the rights of attaching creditor on the grounds of natural justice. It is true that on execution of an agreement for sale, the seller's duty is to receive the purchase money and execute the conveyance, but whatever the obligations under such an agreement, the fact remains that the sale is effected only after the attachment. The attachment does not, of course, create any interest in property and against that the judgment-debtor had incurred an obligation of transferring the property to a third party. It is a misfortune of the purchaser that earlier to the attachment the sale was not completed. The contrary view can lead to an abuse as well. An unscrupulous debtor might execute an agreement to sell knowing well that his creditor would presently institute a suit and get the property attached. There can be another abuse also; a decree has been passed against a debtor but execution not taken out. The debtor executes an agreement to sell and when attachment is effected afterwards in execution of the decree, he sells the property by a private sale. The whole object of section 64 can then be rendered nugatory by the contrary interpretation, and the property of the debtor which could be attached and sold in execution of the decree not made available for the satisfaction of the debt. I am fortified in this view by a Division Bench of the Lahore High Court in *Buta*

Kartar Singh v. Mohinder Singh (Pandit, J.).

Ram vs. Sayyad Mohammad (4) where the opposite view as accepted by the Travancore-Cochin High Court in *Kochuponchi Varughese's case* (2) (*supra*) and the cases cited therein for the aforesaid reasons was not followed. I am in respectful agreement with the view taken in *Buta Ram's case* (4). The executing Court erred in relying on *Kochuponchi Varughese's case* (2).

(6) The revision petition is consequently allowed with costs and the condition attached to the order releasing the property from attachment whereby the petitioners were directed to pay Rs. 3,000 before the attachment was lifted is set aside.

N.K.S.

REVISIONAL CIVIL

Before Prem Chand Pandit, J.

KARTAR SINGH,—*Petitioner*

versus

MOHINDER SINGH,—*Respondent*

Civil Revision No. 508 of 1970.

November 12, 1970.

Evidence Act (I of 1872)—Section 65—Indian Stamp Act (II of 1899)—Section 35—Document inadmissible being not duly stamped—Secondary evidence regarding contents of such document—Whether legally permissible.

Held, that no secondary evidence can be permitted to be led regarding a document, which itself is not admissible in evidence. According to section 35 of the Indian Stamp Act, no instrument chargeable with duty is admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence or shall be acted upon, registered or authenticated by any such person or by public officer, unless such instrument is duly stamped. If the original of a document is inadmissible under section 35 of the Act being not duly stamped, no secondary evidence regarding its contents can, under section 65, of evidence Act be given.

(Para 5)