

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 20.11.2013

Pronounced on: 28.11.2013

+ **EFA (OS) 37/2011, C.M. 19815/2011 (for stay) & 19816/2011 (for filing additional documents)**

BALDEV RAJ JAGGI Appellant

Through: Mr. Amit Sibal, Mr. J.K. Sharma,
Mr. Prateek Chaddha and Mr. Mahender
Singh, Advocates.

versus

NATIONAL AGRICULTURAL COOPERATIVE
MARKETING FEDERATION OF INDIA LTD. AND ORS.

..... Respondents

Through: Mr. A.K. Thakur and Mr. R.K.
Mishra, Advocates, for Resp. No.1.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

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1. The present appeal arises from an order of the learned Single Judge dismissing objections (under Order XXI, Rule 58 CPC) preferred by the appellant, (hereafter “the objector”) concerning the sale of property bearing No. A-13, Block B-1, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi, 110044 (hereinafter “*the property in question*”).

2. The property in question was the subject matter of attachment in a dispute between the National Agricultural Cooperative Marketing Federation of India Ltd. (hereafter “NAFED, the decree-holder), Kripa Overseas (and its director Mr. Sandeep Khanna) and M/s Rital

Impex Ltd (and its director Mr. Pradeep Khanna) – collectively referred to hereafter as “judgment debtors”.

3. The material facts are narrated hereafter. NAFED and the judgement debtors were involved in arbitral proceedings, the subject-matter of which does not concern the Court today. During the course of those proceedings, NAFED preferred a petition under Section 9 of the Arbitration and Conciliation Act, 1996, in OMP No. 291/2006. That petition resulted in an order of injunction, dated 06.07.2006, restraining the sale of several properties, including the property in question, in order to secure NAFED’s claims. Subsequently, the three parties entered into a settlement dated 03.05.2007, recording, *inter alia*, that (operative clause 3):

“3. Rs. 20 Cr. shall be paid within next 60 days upon raising loan by mortgaging the property bearing No. A-13/B-1 and E-16/B-1, Mohan Co-Operative Industrial Estate, Mathura Road, New Delhi-110044. For this purpose M/s Rital impex will provide copy of the sanctioned and release orders issued by the concerned bank along with an undertaking that aforesaid money will be paid to NAFED as per above admitted dates”

4. Accordingly, the property in question was mortgaged with ICICI Bank, Green Park Branch against an advance of ₹1.5 crores. Subsequently, other properties which had been the subject matter of attachment, in Section 9 proceedings, were released from the attachment by an order of the Court on 14.12.2007 (while considering I.A. No. 5743/2007, in OMP 291/2006) in the following terms:

“.....In view of the compromise inter se the parties the attachment of the above said properties No. E-18, East of Kailash, New Delhi and E-16, Block B-1, Mohan Co operative Industrial Estate Limited, Extension, New Delhi is being released to be put on sale.....”

5. This order, as is evident, did not refer to the property in question; it described another property, i.e. E-16, instead of A-13. Another application was moved by the judgment debtor, asking for correction of the order, to incorporate the description of the property in question, to facilitate its sale. The order was, therefore, corrected by the Court and the previous order modified accordingly through an order of 18.12.2007 (in considering I.A. No. 14641/2007); the property in question was allowed to be sold by the owner/judgment debtor.

6. Subsequently, a sale deed was executed by one of the judgment debtors, as the director of M/s. Rital Impex Ltd. in favour of the objector, for a total consideration of ₹3.5 crores. In this, a payment of ₹1.5 crores was made to the ICICI Bank to clear the mortgage and recover the title deeds, and the remainder to the owner/judgment debtor. Later, in the arbitration proceedings between the three parties (NAFED, and the two judgment debtors) an award dated 24.09.2009 was made, in terms of the settlement dated 03.05.2007, as modified by the subsequent order dated 04.04.2008, holding, *inter alia*, that

“NAFED is (sic) held entitled to the outstanding amount by sale of the properties, mentioned in the deed of settlement dated 3.5.2007, by public auction, as agreed

and ordered in the order of Mr. Justice S.L. Bhayana dated 4th April 2008.....”

7. NAFED instituted execution proceedings (Ex.P. 223/2009), where the property in question was attached. The appellant, Shri Jaggi, preferred objections, contending that he had clear title to the property, it was sold without any precondition; that he had no notice of any previous attachment, (of the property in question) under Order XXI, Rule 58 CPC. The objector also contended that he was an innocent third party purchaser without any knowledge of any prior dispute, or encumbrance in respect of the said property. The appellant's objections were, however dismissed.

8. In considering this question, the learned Single Judge referred to the order of 14.12.2007, ultimately concluding that:

“[t]he Court, however, did not permit an unconditional sale by the respondents/judgment debtors of, inter alia, the property in question. The condition was that the respondents shall deposit Rs. 18 crores by the sale of two properties, including the one in question, within 75 days of the sale to satisfy a part of the petitioner/decreed holders claim. This condition has, admittedly, not been complied with. The applicant/objector was, and ought to have been aware of the said condition. To acquire a clear and unencumbered title to the property in question, the objector/applicant should have ensured that the said condition was complied with by the respondents/judgment debtors. The Court specifically directed that the title deeds of the property in question shall be retained by NAFED till the amount of Rs. 18 crore is paid of. Therefore, the applicant/objector should have known that its (sic) titled shall not be perfected by

the mere execution and registration of the sale deed dated 28.12.2007. In fact, the said sale deed could not have been validly executed without complying with the conditions imposed by the Court in its order dated 14.12.2007. The sale deed in question is clearly in contravention of the order dated 14.12.2007 and is subject to Section 52 of the Transfer of Property Act which, inter alia, provides that an immovable property which is directly and specifically in question in a suit or proceedings before a Court, cannot be transferred, so as to affect the rights of any other party except under the authority of the Court and on such terms as it may impose. The terms and conditions imposed by the Court not having been complied with, the property in question could not have been transferred by the respondents/judgment debtors so as to affect the rights of the petitioner/decreed holder. Therefore, the right of the decree holder to seek attachment and sale of the property in question cannot be taken away.”

9. The learned Single Judge also held that the property in question was not released from the lot of properties under the cover of attachment, as was argued in the alternative by the objector, based on the order of 04.04.2008. Finally, the learned Single Judge held that the sale consideration of ₹3.5 crores to the objector for the property seemed to be a gross undervaluation, and although not pleaded, the learned Single Judge took “*judicial notice*” of this fact in holding that such a transfer would also violate Section 53 of the Transfer of Property Act, 1882 and thus, be voidable at the instance of the decree holder, NAFED, for that reason.

10. Impugning this order, Mr. Sibal, learned counsel for the appellant, argued that he (the appellant/objector) was a *bona fide* third

party purchaser, and thus, his rights were protected independent of any question of attachment. It was argued that the objector conducted the necessary due diligence as to the possession, documents, MCD/DDA records and title deeds of the property in question, and there was no occasion to speculate as to the same. It is claimed that no notice of this fact was provided at any point to the objector, until 21st November, 2009, after the sale deed had been executed, when the attachment notice was pasted at the property (under Order XXI, Rule 58, CPC) in the physical possession of the objector at the time. It was argued that on the other hand, the sale deed itself carries a representation from the judgment debtor that the property was free from any attachment. Secondly, it was argued that the release of the property in question was unconditional in the order dated 14.12.2007, and the obligation to pay ₹18 crores was independent of the sale. This, it is argued, is clear from the wording of the order itself. Further, it is argued that this sale is not hit by Section 53 of the Transfer of Property Act, given, first, that the sale was itself permitted by the Court in the above order, and secondly, that third party *bona fide* purchasers are protected in such cases. Finally, it was submitted that the impugned order is based on the wrong premise that the award passed on 24.09.2009 reposed in the property in question as well. This, it is argued, is because the award was passed in terms of the deed of settlement dated 03.05.2007, as modified by the order dated 04.04.2008, and the latter, crucially, has excluded the property in question from being put up from public auction.

11. Learned counsel for NAFED, on the other hand, argued that at no point was the property in question completely released from attachment. Rather, the permission to sell the property was contingent on the payment of ₹18 crores to NAFED. Further, it is argued that the objector ought to have been aware of the restrictions imposed by the Court in terms of the attachment order, and that the Court's acceptance of the present sale transaction would frustrate the rights of the decree-holder. It was also urged that the learned Single Judge had considered the entire gamut of facts in this case and correctly held that objector was not a third party whose rights could frustrate those of the decree-holder.

12. Before the addressing the question arising in this case, it is useful to extract Sections 52 and 53 of the Transfer of Property Act, 1882:

“52. Transfer of property pending suit relating thereto:
During the pendency in any court having authority within the limits of India excluding the State of Jammu and Kashmir Government or established beyond such limits by the Central Government of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.

Explanation : *For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or*

discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

53. Fraudulent transfer

(1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.”

13. Three questions arise for this Court’s consideration: *first*, whether the property in question was still under the cover of attachment at the time of the execution of the sale deed; *secondly*, whether the transfer violates Section 52 of the Transfer of Property

Act, and *finally*, whether it violates Section 53 of the Transfer of Property Act.

14. On the first question, it is important to consider the order of this Court on 14.12.2007 in its entirety:

“As per order dated 16.5.2007 one of the properties No.E-19, East of Kailash, New Delhi were released to be put on sale. Apart from this property two more properties viz. E-18, East of Kailash, New Delhi and E-16, Block B-1, Mohan Cooperative Industrial Estate Limited, Extension, New Delhi were also attached by order of the Court dated 6.7.2006. In view of the compromise inter se the parties the attachment of the above said properties No.E-18, East of Kailash, New Delhi and E-16, Block B-1, Mohan Cooperative Industrial Estate Limited, Extension, New Delhi is being released to be put on sale. The defendants shall pay a sum of Rs. 18 crores towards settlement of the claim of the plaintiff within 75 days. The title deeds shall remain with the plaintiff till the defendants pay the amount of Rs. 18 crores within the stipulated period. List on 12th February 2008, the date already fixed.”

15. The second order, of 18.12.2007, reads as follows:

“It is pointed out that property No. E-16, Mohan Cooperative Industrial Estate Limited, Extension, New Delhi is not correct as given in the order dated 14.12.2007. The correct address is A-13, Block B-1, Mohan Cooperative Industrial Area, Mathura Road, New Delhi. Learned counsel for the plaintiff has no objection if the order is modified accordingly. Hence, the order dated 14.12.2007 is modified to the extent that the address of the property No. E-16, Mohan Cooperative Industrial Estate Limited, Extension, New Delhi is accordingly corrected and modified in the entire order and shall be read as A-13, Block B-1, Mohan

*Cooperative Industrial Area, Mathura Road, New Delhi.
Application stands disposed of.”*

16. A conjoint reading of the two orders would clarify that whereas the first order lifted or vacated the attachment made earlier in respect of two properties, which concededly did not include the property in question, yet, the second order (of 18.12.2007) *specifically* vacated the attachment in respect of the property in question. Counsel for the NAFED had urged that though the attachment of the property in question was vacated by the later order, the intention of the Court was clear that title deeds were to be retained by the decree holder (NAFED) till the amount of ₹18 crores was deposited. This, argued counsel, placed a cloud on the title which the purchaser/objector was deemed to have been aware of. It was further submitted that though the judgment debtor deposited ₹3 cores, the fact remained that till the entire amount was paid, according to the agreement of the parties, the encumbrance over the property existed, signifying that in fact, it was subject to attachment.

17. This Court is of the opinion that the specific order describing the property in question on 18.12.2007 vacated the attachment with the intention that the proceeds collected from it were to be used to pay off the liabilities arising out of the compromise, and payable by the judgment debtors. Had the intention of the parties, particularly of the decree holder, been that till the sum of ₹18 crores was received, it should have charge over the property, it could have provided for it. In this context, it is crucial that both parties were aware that the title deeds to the property in question were not with the NAFED, but with

ICICI. If the NAFED, therefore, was of opinion that some measure of control was necessary, it could have got such safeguards as it wished, to be incorporated in the order of 18.12.2007, to ensure that its rights were protected. Having not done so, it cannot now contend that the attachment had not been vacated, contrary to the plain terms of the order of 18.12.2007 which stands till date. NAFED never chose to apply for its modification or recall. Therefore, on the first issue, this Court holds that the attachment of the property in question had been specifically vacated by the order of 18.12.2007. No conditions or restrictions of the kind, argued by NAFED were applicable to the sale or the title documents in respect of the property in question.

18. Section 52 of the Transfer of Property Act has been extracted above. It incorporates the doctrine of *lis pendens*. The NAFED's argument here is that the property in question became the subject matter of *inter se* disputes between it and the judgment debtor, because of the interim measures directed under Section 9 of the Arbitration Act. It further argues that *lis pendens* applies even in execution proceedings.

19. The NAFED's best argument in this context relies on the Supreme Court's ruling in *Usha Sinha v Dina Ram and Ors.*, (2008) 7 SCC 144, where the Court dealt with the effect of Order XXI, Rule 102, CPC, (which excluded from application Rules 97 to 101). The said rules give third parties the right to obstruct execution proceedings, and claim rival title. Rule 102 states that:

“102. Rules not applicable to transferee pendente lite

Nothing in rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.”

20. Speaking of this rule, it was held that:

“9. Bare reading of the rule makes it clear that it is based on justice, equity and good conscience. A transferee from a judgment debtor is presumed to be aware of the proceedings before a Court of law. He should be careful before he purchases the property which is the subject matter of litigation. It recognizes the doctrine of lis pendens recognized by Section 52 of the Transfer of Property Act, 1882. Rule 102 of Order XXI of the Code thus takes into account the ground reality and refuses to extend helping hand to purchasers of property in respect of which litigation is pending. If unfair, inequitable or undeserved protection is afforded to a transferee pendente lite, a decree holder will never be able to realize the fruits of his decree. Every time the decree holder seeks a direction from a Court to execute the decree, the judgment debtor or his transferee will transfer the property and the new transferee will offer resistance or cause obstruction. To avoid such a situation, the rule has been enacted.”

21. The Court elaborated the origins of the rule, and the underlying purpose, as follows:

“10. Before one and half century, in Bellamy v. Sabine, (1857) 1 DG & J 566 : 44 ER 847, Lord Cranwoth, L.C. proclaimed that where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in

the suit shall be binding not only on the litigating parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end.

14. Keeping in view the avowed object, the expression 'transferee from the judgment debtor' has been interpreted to mean the 'transferee from a transferee from the judgment-debtor [vide Vijayalakshmi Leather Industries (P) Ltd. Vs. K. Narayanan, Lalitha, AIR 2003 Mad 203].

15. In Vijayalakshmi Leather Industries, it was urged that the provisions of Rules 98 and 100 of Order XXI of the Code had limited application to the transferee of the judgment- debtor and could not extend to 'a chain of transactions' where the transferee of the judgment-debtor had transferred his interest.

16. Referring to statutory provisions and case law, the Court negated the contention, stating-

“If such contention of the learned senior counsel for the appellant is to be accepted, then we are closing our eyes regarding the intention of the statute. It is obvious while interpreting the provisions of the statute, the court must give due weight to the intention of the statute in order to give effect to the provisions. If any narrow interpretation is given and thereby the purpose of the statute is being defeated, the courts must be careful to avoid such interpretations. If we look at Section 52 of the Transfer of Property Act and Rule 102 of Order 21 C.P.C, it is very clear that the intention of the Parliament

with which the statute had been enacted is that the rights of one of the parties to the proceeding pending before the court cannot be prejudiced or taken away or adversely affected by the action of the other party to the same proceeding. In the absence of such restriction one party to the proceeding, just to prejudice the other party, may dispose of the properties which is the subject matter of the litigation or put any third party in possession and keep away from the court. By such actions of the party to the litigation the other party will be put to more hardship and only to avoid such prejudicial acts by a party to the litigation these provisions are in existence. When in spite of such statutory restrictions, for the transfer of the properties, which are the subject matter of litigation by a party to the proceeding, the courts are duty bound to give effect to the provisions of the statute.”

The above observations, in our opinion, lay down correct proposition of law.”

22. The observations in the above judgment, in the opinion of the Court, are in no way different from what Section 52 states; its object is to strike at those transfers and alienations of properties during pending proceedings “*in which any right to immovable property is directly-and specifically in question*”. In *Rajender Singh & Ors v. Santa Singh & Ors*, AIR 1973 SC 2537, Section 52 was further analysed as follows:

“The doctrine of lis pendens was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court, in which a dispute on rights or

interests in immovable property is pending, by private dealings which may remove the subject matter of litigation from the ambit of the court's power to decide a pending dispute of frustrate its decree.. Alienees acquiring any immovable property during a litigation over it are held to be bound, by an application of the doctrine, by the decree passed in the suit even though they may not have been impleaded in it. The whole object of the doctrine of Its pendens is to subject parties to the litigation as well as others, who seek to acquire rights in immovable property which are the subject matter of a litigation, to the power and jurisdiction of the Court so as to prevent the object of a pending action from being defeated.”

23. The Court is of the opinion that NAFED’S argument that the objector’s title is subject to the doctrine of *lis pendens* is contrary to the substantive provision. In the present case, NAFED’S claim was one for money in arbitral proceedings. Pending adjudication, it sought for interim measures, including attachment of the judgment debtor’s properties, to secure a possible future award in its favour. That it secured an attachment did not enlarge the scope of its claim into one encompassing “*any right to immovable property*” “directly” or “specifically”. Consequently, in the absence of any restriction as to the marketability of the title, or direction by the Court, amounting to an encumbrance or charge of some kind, the order of 18.12.2007 operated to lift the attachment. This was done to facilitate sale; the direction in the previous order of 14.12.2007 that NAFED could retain the title deeds till it was paid ₹18 crores was meaningless and inapplicable in regard to the property in question, because the title deeds were with ICICI Bank, which were later redeemed by the

purchaser objector, who was made aware of the mortgage in favour of that bank.

24. The last question is whether the sale of the property in question fell within the mischief of Section 53 of the Transfer of Property Act. That provision directs that properties sold with intent to defraud creditors of the transferor shall be void. In this context, it would be useful to recollect the observations of the Karnataka High Court in *Basavegowda and etc. v. S. Narayanaswamy (by LRs) and Ors.*, AIR 1986 Karn. 225:

“10.....it must be borne in mind that the onus of proving want of good faith in the transferee is on the creditor who impugns the transactions. But where fraud on the part of the transferor is established, i.e. by the terms of Para (1) of S. 53(l), the burden of proving that the transferee fell within the exception upon him and in order to succeed the transferee must establish that he was not a party to the design of the transferor and that he did not share the intention with which the transfer has been effected but that he took the sale honestly believing that the transfer was in the ordinary and normal course of business. (See: [C. Abdul Shukoor Saheb v. Arji Papa Rao](#), AIR 1963 SC 1150)”.

25. In the present case, far from discharging the onus of proving want of good faith, NAFED merely relied on a textual interpretation of the orders dated 14.12.2007 and 18.12.2007 and argued that the property was sold for inadequate consideration. The learned Single Judge accepted the latter argument. However, there was no shred of evidence in support of such finding. Concededly the impugned order is based on “*judicial notice*” having been taken about the prices of

land. With respect, this Court cannot subscribe to such an approach. The law casts a burden on the decree holder (NAFED), who has gotten its rights crystallized subsequently in the award. Till then, it had no claim in respect of the suit property, which for a brief while, faced attachment. That attachment was lifted, to enable its sale, in order to satisfy NAFED's claims. If it had really wished that the sale ought to have proceeded in a particular manner, nothing prevented it from insisting upon imposition of conditions. Having failed to do so, its mere allegations of undervaluation of the property, without any proof, could not have resulted in the impugned finding.

26. In view of the above discussion, the appeal has to succeed. It is accordingly held that the appellant's rights over the property in question were not the subject matter of any attachment, impediment or restriction as to defeat its title. The impugned order is, therefore, set aside. The appeal is allowed. There shall be no order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

NOVEMBER 28, 2013