

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 120 OF 1995

Karbhari Rangnath Joshi

Age : Major, Occ. Agri.,

R/o : Belapur Khurd,

Tq. Shrirampur, District :

Ahmednagar.

..... APPELLANT/

[ORI. THIRD PERSON]

V E R S U S

1. Nana Krishna Kulkarni
[since deceased Thr. L.Rs. :]

1-A Shripad Nana Kulkarni
Age : 40 Yrs., Occ. Service,
R/o : H.J.Colony, B-99,
Pimpri, Pune – 18.

2. Eknath Keshav Kulkarni
[since deceased Thr. L.Rs. :]

2-A. Mohan Eknath Kulkarni
Age : 55 Yrs., Occ. Driver,
R/o : Wahegaon, Tq. Gangapur,
District : Aurangabad.

- 2-B. Balkrishna Eknath Kulkarni
[Abate vide Order dt. 15/12/2010]
- 2-C Vasant Eknath Kulkarni
Age : 45 Yrs., Occ. Service,
R/o : Belapur Khurd,
Tq. Shrirampur, District :
Ahmednagar.
- 2-D Saw. Baby Baburao Waghmare
Age : 39 Yrs., Occ. Household,
R/o : Belapur Khurd,
Tq. Shrirampur, District :
Ahmednagar.
3. Chandrabhan Waman Barhate
Age : 40 Yrs., Occ. Agri.,
R/o : Belapur Khurd,
Tq. Shrirampur, District :
Ahmednagar.
4. Sopan Waman Barhate
Age : 38 Yrs., Occ. Agri.,
R/o : Belapur Khurd,
Tq. Shrirampur, District :
Ahmednagar.
[dismissed vide Order
dated 15/12/2010].
5. Shamala Padmakar Joshi

Age : 35 Yrs., Occ. Household,

C/o Nana Krishna Kulkarni

at Belapur Budruk,

Tq. Shrirampur, District : ... **RESPONDENTS/**
Ahmednagar. **[ORI. DEFENDANTS]**

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Mr. S.P.Brahme, Advocate for Appellant.

Mr. C.V.Korhalkar, Advocate for R.Nos. 1 (a) & 5.

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CORAM : T.V.NALAWADE, J.

DATE OF JUDGMENT : 21/04/2016

JUDGMENT :

1. The Appeal is filed against the Order made in R.D. No. 119/1970 which was pending in the Court of the Civil Judge [Jr.Division], Shrirampur, district Ahmednagar. It is also against the Judgment and Decree of R.C.A. No. 69/1989 which was pending in the District Court, Ahmednagar. Appellant is third party to the proceeding and he had filed application for vacating the order of attachment of one property made in R.D. No. 119/1970. This application is rejected by the Courts below. Both sides are heard.

2. When the appeal was admitted by this Court, this Court had expressed that substantial questions of law can be formulated on ground Nos. (ii), (iii) and (iv) of appeal memo. They are as follows.

[i] Whether it can be presumed that no notice was given to the Judgment Debtor under the provisions of Order XXI Rule 5 of the Code of Civil Procedure and due to the absence of notice, attachment order made by the Court can not be recognized in law ?

[ii] Whether it can be presumed that copy of attachment warrant was not sent to the Collector as per the requirement of Section 54 of the Code of Civil Procedure and due to that, appellant – third party, gets ground that he had no notice of attachment and he is bonafide purchaser ?

[iii] Whether in view of the provisions with regard to the consequences of attachment made by the Civil Court and subsequent auction sale made by the Civil Court of the attached property, defence is open to the third party that he is bonafide purchaser ?

3. Respondent Nana Kulkarni had filed R.C.S. No. 76/1956 against one Pujari for recovery of amount

of ₹ 1,500/- for damages for keeping his land in illegal possession and also for relief of possession. This Suit was partly decreed in favour of Nana and in addition to the relief of possession, the decree of recovery of ₹ 600/- as damages was given. The decree of future mesne profit was also given.

4. R.D. No. 119/1970 was filed for recovery of mesne profit and R.D. No. 34/1972 was filed by Nana for the recovery of amount of damages and interest accrued on it amounting to ₹ 1,500/-. In both the execution proceedings, G.No. 431 to the extent of 1 H. 20 R. portion of north side was attached for the security of the aforesaid amount. In R.D. No. 34/1972, even after the auction sale order made by the executing Court, compromise took place and the Judgment Debtor gave possession of his property G.No. 431 to the Decree Holder Nana in lieu of the interest which was accruing of ₹ 1,500/-. He had agreed to return the amount of ₹ 1,500/- within 5 years from the date of possession and after giving that amount, Nana was to return back the possession of the disputed property to its owner, Pujari.

5. In the year 1980, present applicant and Judgment Debtor entered into an agreement of sale of

this land. It is the case of the appellant/applicant that he gave money as a part of consideration to the Judgment Debtor for getting back the possession of the aforesaid property. It appears that the Judgment Debtor offered to pay ₹ 1,500/- to the Decree Holder, but the Decree Holder did not accept the amount and avoided to hand over the possession. The litigation was then started for giving possession of the disputed property by the owner and ultimately after the decision of R.C.S. No. 236/1985, Judgment Debtor got possession of the disputed property on 12/12/1986. As the agreement was already executed by the Judgment Debtor in favour of the present appellant, he executed the sale deed of this land in favour of the present appellant on 18/03/1987.

6. It is the case of the appellant that he had no knowledge of attachment of this property in R.D. No. 119/1970. It is contended that due to absence of notice, he purchased property and he had verified the necessary record before getting the sale deed executed.

7. The application at Exh. 139 in R.D. No. 119/1973 came to be filed on 03/01/1989. Prior to that

date, the order of auction sale was already made in respect of the property. The Decree Holder filed reply to this application and he contended that the attachment order which was already made in the year 1974 was confirmed by the superior Court and so the transaction of Judgment Debtor and present appellant – third party is void.

8. The executing Court has rejected the application by holding that there was order of attachment when the third party agreed to purchase the property and also purchased the property from Judgment Debtor. The executing Court has held that the transaction itself is void. The trial Court refused to withdraw the order of attachment made in the year 1974. The first appellate Court has confirmed this decision.

9. The record shows that third party – appellant is admitting that it was within his knowledge that the property was attached in the litigation which was going on between his vendor and the Decree Holder. He also admits that he had knowledge that there was compromise between Judgment Debtor and his vendor and the Decree

Holder and due to that compromise, the possession of the disputed property was already given to the Decree Holder. Thus, he admits that he had knowledge about the order of attachment made at least in one executing proceeding. Due to this circumstance and as he ought to have ascertain the nature of decree given against the Judgment Debtor, it can not be believed that he had no knowledge that another judicial proceeding was pending for recovery of mesne profit and interest on it. Other proceeding was pending for recovery of ₹ 9,900/- and this proceeding was filed on 14/07/1970, before filing of the execution proceeding of which there was knowledge to the present appellant. The amount had gone up to ₹ 12,887/- in R.D. No. 119/1970. In view of these circumstances, it is not possible to believe that the third party – appellant had no knowledge about the existence of other execution proceeding and order of attachment made in that proceeding. Said order was made even in the Suit.

10. The only objection taken to the attachment by the present appellant is that the order of attachment was not sent to the Collector as required by law. The

aforesaid discussion shows that there was attachment of this property right from beginning and in the present execution proceeding the attachment order made in the past was continued in the year 1974 and then order was made as follows :

*“ Land G.No. 431 be attached.
Issue attachment order under Order
XXI Rule 54 of the Code of Civil
Procedure in respect of that land.
Decree Holder to file proceeding for
auction sale and it is to be made by
issuing public notice and also notice
to the Judgment Debtor. ”*

11. The amount recoverable is already mentioned and so it can not be said that there was no attachment order in existence in respect of the suit property. The record does not show that Judgment Debtor is coming forward to say that he had not received the order of attachment. On the other hand, the record shows that he had published notice in news-paper to prevent Decree Holder from disposing of the property. When the order of attachment was made as above, it needs to be presumed that as per Section 114 of the Evidence Act, necessary procedure was followed. It is

already observed that the appellant had knowledge about the attachment order made in both the proceedings. Thus, in view of the provisions already quoted, the transaction itself is void. Further, when the attachment order was made, present appellant was not in picture and so he has no *locus standi* to challenge the said order of attachment. No error of law can be found in the orders made by the Courts below, though different reasons are given.

12. In the result, all the aforesaid points are answered against the appellant and the Second Appeal stands dismissed.

[T.V.NALAWADE, J.]