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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment pronounced on: 28.08.2019

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EX. F.A. 25/2017

KARAM CHAND

.....Appellant

Through:

Mr. Abhishek Puri and Mr. Yashrath Misra,
Advocates

Versus

M/S CUTTING EDGE INFRASTRUCTURE
PVT. LTD. & ANR.

.....Respondents

Through:

Mr. Arvind Nigam, Sr. Advocate with Mr.
Rohan Thawani, Mr. Anand Daga and Mr.
Mehtaab Singh Sandhu, Advs. for R-1.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J.

Ex. F.A. 25/2017, CM Appl. 24849/2017 & 27933/2017

1. This appeal under Article 227 of the Constitution of India impugns the order of the learned Additional District Judge dated 24.03.2017 declining the appellant's application seeking attachment of property bearing House No. B-5/96, Safdarjung Enclave, New Delhi (in short the 'property').

FACTS:

2. The appellant had loaned monies to Harwinder Singh – respondent no.2 in November and December, 2003. Since there was default in its repayment, he filed a suit for recovery of the monies before the High Court of Himachal Pradesh. The suit was decreed on 28.09.2010. During the

pendency of the said suit, Harwinder Singh by order dated 06.07.2005 was restrained from selling, transferring or encumbering the aforesaid property. This order was confirmed on 19.12.2006. It is in execution of this decree dated 28.09.2010 that the appellant has sought attachment of the aforesaid property.

3. Respondent no.1 – Cutting Edge Infrastructure Pvt. Ltd. (Cutting Edge) opposed the attachment on the ground that the Judgment Debtor (JD) - Harwinder Singh and his wife were co-owner of the aforesaid property admeasuring 199 sq. yds.; vide an unregistered agreement dated 06.03.2003 they had agreed to sell it to M/s Anant Raj Agencies Pvt. Ltd. (Anant Raj) for a consideration of Rs. 62 lacs, of which Rs. 60 lacs had been paid vide two cheques of Rs. 30 lacs each, and the same were credited to the account of Harwinder Singh on 07.03.2003 [as recorded in the order of the Division Bench of this Court dated 16.05.2012 in EFA(OS) No. 19/2012].

4. On account of default of Harwinder Singh in handing over the property, Anant Raj filed suit for specific performance on 01.09.2005 in this Court, which was decreed on 04.09.2009. Throughout the proceedings JD-Harwinder Singh never disclosed the factum of the restraint orders of the Himachal Pradesh High Court dated 06.07.2005 and 19.12.2006. Thereafter, through an order in Execution Petition no. 250/2009, the aforesaid decree dated 04.09.2009 i.e. a Sale Deed dated 03.12.2009 was executed by an officer of this Court. Thereafter, Cutting Edge has purchased the property from Anant Raj.

5. In execution of this decree dated 28.09.2010, the appellant filed an Execution Petition bearing no. 31/2010 before the Himachal Pradesh High

Court, in which an order was passed on 18.12.2010 attaching the property and Plot No. 2, Block No. B-1, Safdarjung Enclave, New Delhi.

6. The aforesaid decree was sent to this Court for execution as per law. The same was considered by this Court on 08.04.2011. Notices were issued to the Decree Holder (DH) as well as the JD. The latter had filed Execution Petition No. 121/2011 in Delhi as well, seeking attachment of the aforesaid property, but withdrew the petition, in view of the *suo motu* case being registered by this Court. This Court by order dated 28.03.2012 had observed that order of 18.12.2010 passed by the Himachal Pradesh High Court was liable to be vacated. This observation was challenged by the DH, but since a final order in the appeal had not been passed, the DH withdrew the same with liberty to pursue the remedies in accordance with law. In Execution Appeal No. 328/2012 by order dated 11.05.2012 this Court had directed that the sale deed be registered in favour of the objector - Cutting Edge, however, the same was without deciding on the objections filed by the Objector. The appellant's appeal to the Division Bench of this Court was dismissed by order dated 16.05.2012 with the observation that since the matter was still pending before the Single Judge no case for intervention was made out. The appellant's appeal to the Supreme Court by way of an SLP, was also dismissed.

7. The appellant argues that the suit between Harwinder Singh and Anant Raj was a collusive one and was instituted only to frustrate the suit filed by the appellant in Himachal Pradesh. It is also argued that under their agreement, the said parties entailed performance i.e. delivery of the suit property within one year of the agreement, failing which the parties could rescind the agreement, which would entail the vendor returning the entire

amount along with interest @ 20% per annum. The appellant further contends that the respondents are not bonafide purchasers of the property because they knew of the decree against Harwinder Singh; the aforesaid transaction between him and Anant Raj was a sham transaction and the appellant had therefore, objected to the registration of the sale deed before the Sub-Registrar on 12.01.2011¹.

8. Having considered the aforesaid contentions, the impugned order has observed that the suit between JD - Harwinder Singh and Anant Raj was decreed by this Court; a sale deed was executed in favour of Anant Raj through an officer of this Court; the said Property was then transferred to the objector – Cutting Edge and the appellant's appeal against the same all the way to the Supreme Court was unsuccessful. Furthermore, the said property was owned by JD-Harwinder Singh and his wife, whereas the decree is only against the JD, therefore it could not be attached against a person who was not a JD. The impugned order has held as under:

“....16. The JD alongwith his wife had entered into an agreement to sell dated 06.03.2003 with M/s Anant Raj Agencies Pvt. Ltd. to sell the property no. B-5/96, Safdarjung Enclave, New Delhi. The decree holder had filed the suit for recovery against the JD on 02.07.2005, before the Hon'ble High Court of Himachal Pradesh. Thus, the contentions of the decree holder that the JD had entered into agreement to sell in collusion with M/s Anant Raj Agencies Pvt. Ltd., has no substance because the agreement to sell was entered much prior of giving friendly loan by the decree holder to the JD as the loan was given in the month of November and December 2003, whereas the agreement to sell was entered on 06.03.2003.

¹ Page 173 para xii of the paper book.

17. *M/s Anant Raj Agencies Pvt. Ltd., had purchased the property bearing No. B-5/96, Safdarjung Enclave, New Delhi, during the execution proceedings by way of sale document executed by a court appointed officer, after getting a decree in its favour, passed by Hon'ble Delhi High Court on 04.09.2009 in the CS(OS) No. 1213 of 2005, titled M/s Anant Raj Agencies Pvt. Ltd. vs Harwinder Singh & Anr. Thus, M/s Anant Raj Agencies Pvt. Ltd. had bonafidely entered into Agreement to Sell and purchased the property under a court decree. The judgment/ decree dated 04.09.2009 is still a valid judgment/ decree passed by the Hon'ble High Court of Delhi. I am afraid that this court during the execution proceedings of instant case, can hold the judgment/ decree dated 04.09.2009 as null and void, which was passed by another court of a competent jurisdiction. If the DH is aggrieved by judgment/ decree dated 04.09.2009 then he has to get the said judgment /decree as null and void only thereafter he can seek attachment of the property which was sold/ part performed during the execution of the said judgment/ decree. It is also important to mention here that the Hon'ble Delhi High Court in its order dated 09.09.2013 has held that 'It appears that the decree holder as well as the objector company are proceeding on the assumption that the order dated 18.12.2019, passed by Hon'ble High Court of Himachal Pradesh directing issuance of a precept amounted an attachment order. That, however, is not the correct position in law. A precept under Section 46 is only a request of a court passing the decree to another court where the decree holder intends to initiate proceedings because of the judgment debtor having attachable properties which the jurisdiction of the court to which decree is transferred under Order XXI Rule 6 CPC. Upon receipt of the precept the transferee court has to attach the property in respect of which precept is received by it and even that attachment remains in force for a period of two months unless that attachment is extended by the court which has passed the decree. This is provided in section 46 CPC itself'. It was further held "However, no*

formal preccept appears to have been received by his court and that is evident from the fact that no attachment order was passed by this court on receipt of the aforesaid order dated 18.12.2010". Thus, it is further clear that the property No. B-5/96, Safdarjung Enclave, New Delhi has not been attached till date. It is further important to mention here that the property No. B-5/96, Safdarjung Enclave, New Delhi was owned not only by the JD but also by his wife. The question arises how the property of a person (wife of JD) who has share in the property, can be attached when there is no money decree passed against him/ her.

18. In view of the above discussions, I am of the considered view that the property No. B-5/96, Safdarjung Enclave, New Delhi cannot be attached, as the same is not owned by the JD and the JD had sold the said property to M/s Anant Raj Agencies Pvt. Ltd., prior to judgment/ money decree dated 28.09.2010, passed by Hon'ble Himachal Pradesh High Court. Hence, the instant application has no merits and the same is dismissed...."

9. What emanates from the above is that the property was owned by JD-Harwinder Singh and his wife. The money decree was only against JD-Harwinder Singh. Therefore, it being co-owned by another person, could not be attached because the money decree had not been passed against the co-owner. The transfer of the property from JD-Harwinder Singh to Anant Raj was in execution of a court decree and thereafter to Cutting Edge by way of order of this Court; the same has been appealed against before the Supreme Court, but without success; the decree of this Court was passed earlier in time i.e. on 04.09.2009 whereas the Himachal Pradesh decree was passed after a year on 28.09.2010; nothing has been brought on record to show that either Anant Raj or the Cutting Edge had any knowledge of the pendency of the *lis* in Himachal Pradesh High Court. No collusion shown or

proven between Anant Raj and the JD. In any case this Court's decree dated 04.09.2009 would have to be challenged before the appropriate forum. It was not so done, and has become final. Third party interest has been created; therefore, the learned Executing Court could not have altered the effect of the decree dated 04.09.2009. The rejection of the application seeking attachment of the aforesaid property was justified and calls for no interference.

10. The appellant has relied upon the dicta of the Supreme Court in ***Har Narain (Dead) by Lrs. vs Mam Chand (Dead) by Lrs. And Ors.*** (2010) 13 SCC 128, which has held *inter alia* that a sale executed between parties could not be termed as complete unless the sale document was registered and upon registration of the same it would relate back to the date of execution. The appellant contends that since the dispute was pending before this Court the objector-Cutting Edge had knowledge of the decree in favour of the appellant, therefore, the principle of *lis pendens* would apply to them and the sale deed should not have been executed in their favour.

11. Refuting the said argument, Cutting Edge contends that it has been established in terms of the order of the Division Bench, as noted hereinabove, that the agreement between JD-Harwinder Singh and Anant Raj was made prior to the appellant's loan transaction. A right and interest had been created between JD-Harwinder Singh and Anant Raj on 06.03.2003, monies had been paid the very next day on 07.03.2003 and the same has been duly noted in the order of the Division Bench as mentioned hereinabove. Therefore, the interests, in favour of Anant Raj, was created in March 2003, far before the loan was given by the appellant to JD-Harwinder Singh in November and December, 2003. There could not possibly be any

collusion between JD-Harwinder Singh and Anant Raj and/or the present objector-Cutting Edge, to thwart any transaction which was yet to happen between the appellant and JD-Harwinder Singh. It would also be preposterous to assume that JD-Harwinder Singh and Anant Raj had done this to frustrate the decree which would be passed seven years later by the Himachal Pradesh High Court.

12. Mr. Arvind Nigam, the learned Senior Court for respondent no.1 refers to the decision of the Supreme Court in *Vannarakkal Kallalathil Sreedharan vs Chandramaath Balakrishnan & Anr.* (1990) 3 SCC 291, which has held that when an Agreement of Sell is entered before attachment, the conveyance after attachment in pursuance of the contract passes on good title inspite of the attachment.

13. What emanates from the preceding discussion is that the Agreement to Sell between JD-Harwinder Singh and Anant Raj was entered about eight months prior to any transaction of loan between the appellant and JD-Harwinder Singh. The latter transaction resulted in default of repayment, hence, the suit filed in Himachal Pradesh High Court was decreed in the year 2010. However, unrelated that transaction about eight months earlier an interest had already been created in favour of Anant Raj by virtue of the agreement with JD-Harwinder Singh on 06.03.2003 for Rs. 62 lacs, of which Rs. 60 lacs was paid on 07.03.2003. The bank certificates have verified the said transfer; the balance Rs. 2 lacs was to be paid at the time of the execution of the Sale Deed. It has been so recorded by this Court in its order dated 11.05.2012 in Ex. P. 107/2011. The Agreement to Sell in favour of Anant Raj created an obligation in the latter's favour and any attachment of the property would not be free from the obligations incurred under the

said/earlier contract of sale. Therefore, the Agreement for Sale arising prior in time was to be allowed to prevail over the rights of the attaching creditor and the latter's right cannot be allowed to override the contractual obligations which are subsequent thereto.

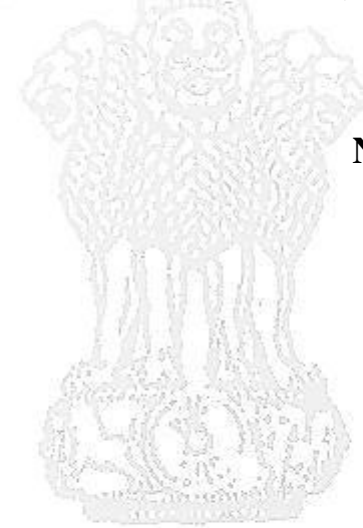
14. Therefore, reliance of the appellant on *Har Narain* (supra) is inapplicable in the facts of this case. Instead the decision in *Vannarakkal Kallalathil Sreedharan* (supra) would be applicable.

15. In view of the above, this Court finds no reason to interfere with the impugned order. The appeal is without merit and, accordingly, dismissed.

NAJMI WAZIRI, J.

AUGUST 28, 2019

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