

**IN THE HIGH COURT OF SINDH,  
AT KARACHI**

**C. P. No. D-2847 of 2012**

**Present:**

Ahmed Ali M. Shaikh, CJ  
and Yousuf Ali Sayeed, J

Petitioner : Mst. Zaria Begum (since Deceased) through her legal heirs through Naeem Akhtar, Advocate.

Respondent No.1 : Zafar Iqbal through Imran Raza, Advocate.

Respondents No.2 to 8 : Nemo.

Date of hearing : 25.08.2022.

**ORDER**

**YOUSUF ALI SAYEED, J.** - The Petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution, impugning the Order dated 30.07.2012 made by the learned IIIrd Additional District Judge, Karachi, East, dismissing Civil Revision Application No.67/2012 filed by the Petitioner against the Order of the learned IInd Senior Civil Judge, Karachi, East, dated 12.05.2012, whereby the Applications filed by her under Order XXI Rule 26 CPC and Order XXI Rule 58 CPC respectively in Execution No.19/2010 emanating from Civil Suit No.627/2004 were dismissed.

2. The aforementioned Rules of the CPC provide as follows:

**26. When court may stay execution.-** (1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

**58. Investigation of claims to, and objections to attachment of, attached property.-** (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit:

[Provided that no such investigation shall be made where it appears to the Court that the claim or objection (whether made before or after the sale) has been designedly or unnecessarily delayed, or was not made within a reasonable time or within one year of the date of the first attachment of the said property in the execution of the said decree, whichever is earlier, unless the claimant or objector:-

(a) proves title acquired in good faith and for consideration subsequent to the date of the first attachment;

(b) proves that his predecessors-in-interest, whether their interest existed at the time of such attachment or was acquired thereafter, fraudulently omitted to make a claim or objection; and

(c) he impleads all such predecessors-in-interest, as parties.]

(2) *Postponement of sale.* Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

3. The Suit had initially been filed by the Respondent No. 1 (the “**Claimant**”) against the Respondents Nos. 2 to 5, for recovery of an amount of 2,000,000/- said to have been advanced by the Respondent No.4 to the Respondents Nos. 2 and 3 (the “**Beneficiaries**”) through a convoluted transaction, against the strength of a guarantee extended by the Claimant, which was in turn backed by the title documents of certain immovable properties, including Shop No. 15, Sub-Plot No. A-8, Garden East Quarters, Karachi (the “**Property**”) deposited by the Beneficiaries with the Claimant coupled with the execution of an irrevocable General Power of Attorney in his favour. The Petitioner was not one of the original defendants to the action, but was subsequently impleaded through an Application under Order 1 Rule 10 CPC moved by the Claimant in the wake of the plea taken by one of the original defendants that the Property had been sold to her. Be that as it may, the judgment that came to be passed on 04.03.2010 was directed only against the Beneficiaries, whereby they were held to jointly and severally liable for payment of the aforementioned sum along with mark-up at the rate of 14% from the date of the decree till realization. Per the Petitioner, she was never served with any notice/summons, hence had no knowledge of the Suit until attachment of the Property during the course of the Execution brought to bear by the Claimant for satisfaction of the judgment and decree. However, even at that stage, no application under Section 12 (2) CPC or Order 9 Rule 13 CPC was filed. Instead, recourse was made to the aforementioned Applications, placing reliance on the Sale Agreement, with it being contended by the Petitioner that she was a bona fide purchaser of the Property, hence the same was not liable to attachment and foreclosure at the behest of the Claimant.

4. A perusal of the Order made on those Applications by the Executing Court reflects that in the estimation of that forum, the Petitioner's plea was disingenuous, hence did not warrant in depth consideration. The operative part of the Order reads as follows:-

*“It is matter of record that the applicant Mst. Zara Begum was Judgment Debtor/ defendant in Suit No.627/2004 but she did not contest the suit as evidence from perusal of Judgment. It is admitted that present applicant is wife of J/D No.2. There is no difference in law that sale agreement is not titled document and does not create any right in favour of any person. The applicant/JD No.5 has filed both these applications by claiming the right and interest in attached property on basis of sale agreement, which is not a titled document in favour of plaintiff. In record of rights the attached property is still in name of J/D No.2 and he is shown exclusive owner of the same. The sale agreement under which applicant (wife) has purchased the attached property from J/D No.2 (her husband), was executed on 09.01.2001. This sale agreement is not a registered sale agreement nor is attached document. This shows that it was merely prepared and kept malafidely for purpose to deal with the consequences and effects of Judgment and Decree, if passed against Defendants/JDs No.5 never demanded specific performance of the same since its preparation or execution in year 2001. In these circumstances it is clear that there was collusion between J/D No.2 and present applicant/JD No.5 and they acted malafidely during proceedings of suit as well as in present execution proceedings. It is sure that applicant/JD No.5 being wife of J/D No.2 was in knowledge of suit as well as Judgment and Decree passed against J/D No.2. She has also joined in suit as defendant/JD No.5 under order I Rule 10 CPC but despite this she malafidely kept herself deliberately at distance from legal proceedings. However, she was in knowledge about the facts of present suit and its pendency.*

*In view of above discussion and the fact that J/D No.2 is still owner of attached property and still record of attached property is in his name. The applicant /JD No.5 has no right and interest in attached property on the basis of unregistered sale agreement dated 09.01.2001. Therefore, the present application does not bear merits and dismissed with no order as to costs. Let writ of possession be issued with police aid and possession of attached property be given to the Nazir District Court Karachi-East.”*

5. The Petitioner then resorted to the Revision, contending that her objections had not been properly examined by the Executing Court, as its view had been blinkered by the misconception of a marital relationship. However, the plea failed, with the Revisional Order reading thus:-

*“From perusal of record reveals the applicant claims herself as owner of the attached Shop No.15, Ground Floor, measuring 36.77 sq. yards having 1.5 undivided share in piece and parcel of land sub plot No.A-8, Survey No.670, Garden Est. she became owner by virtue of agreement of sale dated 19.01.2001 alleged to have executed between Raja M. Iqbal s/o Saraj and the applicant. Admittedly the shop in question still registered in the name of owner.*

*The ownership has not been changed by registered deed in favour of the applicant. Meaning thereby the title is not changed and when no registered document in her favour she could not claim herself as owner until it is declared by the court where the suit for specific performance is pending against said Raja M. Iqbal.*

*However the law referred by the applicant reported in 1991 CLC Note Karachi 188 regarding the inquiry by the executing, court on the objection, filed by the objector where in claim ownership by the three different person should not be dismissed summarily.*

*Obviously it should not be dismissed without inquiry, but in the instant case the question of inquiry does not arise as the property attached still registered in the name of owner, it has not been transferred and the law says mere agreement of sale does not confer any, title, legal right. There in another referred case law reported in 2001 MLD Karachi 1828 also pertains to same point of title over the property. No doubt the inquiry must be conducted but it should be where the title is not clear. As such the above referred case law are distinguished with the facts and circumstances of the present case.*

*In the instant case the applicant herself has admitted that an agreement of sale executed regarding the shop in question but no sale deed was registered in her favour, however she come before the court and file suit for Specific Performance of contract against the person who is JD in the present case, as such if it is proved that she has any right, the learned trial Court is competent to decide the same.*

*For the foregoing reason, it is crystal clear the order of the learned trial Court not require interference, it is just and proper, hence it is maintained.”*

6. Proceeding with his submissions, learned counsel for the Petitioner drew attention to the finding of the executing Court that the counter-party to the Sale Agreement had been the husband of the Petitioner, which reflected that she had knowledge of the Suit and the transaction was collusive and merely a device to frustrate the decree. He pointed out that the name of the vendor (i.e. the JD No.2) was different from that of the Petitioner's husband and contended that such error had swayed the executing Court in its decision to dismiss the Petitioners Applications without undertaking an investigation. He contended further that the error of identity had been raised before the Revisional Court, but had not been considered, with the Court proceeding to dismiss the Revision whilst concurring with the finding of the lower forum that a Sale Agreement did not create any right and interest in attached property.
  
7. In response, learned counsel for the Claimant supported the Orders of the fora below, while arguing that the Petitioners Applications had been rightly dismissed on the basis that the Sale Agreement did not serve to create any interest in the property.
  
8. We have heard the arguments advanced at the bar and considered the same in light of the relevant material on record.

9. It is apparent from a perusal of the title of the plaint that there is disparity between the names of the JD No.2 and the Petitioner's husband, with the former being arrayed as Raja M. Iqbal and the latter identified as the wife of one Malik M. Iqbal Khan.
  
10. Furthermore, it is discernible from the tenor of the Order dated 12.05.2012 that considerable emphasis was placed by the executing Court on the supposed relationship between the Petitioner and the JD No.2, with it being reasoned on that very basis that the Sale Agreement was mala fide and collusive, and that the Petitioner had knowledge of the Suit, yet chose not to come forward. As such, the executing Court was clearly swayed by what appears to be a misconception.
  
11. Whilst the point of such an error was raised by the Petitioner through the Revision Application, the same does not appear to have been considered. Indeed, the Order made by the Revisional Court contains no discussion in that regard, but merely endorses the view of the lower forum that no investigation was required in terms of Order 21, Rule 58 CPC as the purported sale agreement did not serve to create any right or interest in the Property in favour of the Petitioner.
  
12. While the Orders of the fora below appear to be predicated in that respect squarely on Section 54 of the Transfer of Property Act 1882, (the "**Act**") which clarifies that a contract for the sale of immovable property "does not, of itself, create any interest in or charge on such property", both the lower forums failed to consider that Section 53-A of the Act provides as follows:

**53-A. Part performance.** Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof or the transferee, being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract, then notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore, by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by me terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

13. It merits consideration that it has consistently been held throughout a long line case law that Section 53-A of the Act serves to shield possession of property obtained in part performance of a contract of sale, and if any authority is required in that in that regard, one may look to the judgment off the Honourable Supreme Court in the case reported as Syed Athar Hussain Shah v. Haji Muhammad Riaz and another 2022 SCMR 778, where it was held as follows:-



“Section 53-A does not confer or create a right, and its use is defensive as has been continuously held by this Court, including in the in cases of Shamim Akhtar v. Muhammad Rasheed, Muhammad Yousaf v. Munawar Hussain and in Amirzada Khan v. Ahmad Noor where this Court held, “it is well-settled principle of law that possession of property obtained in part performance of a contract can only be used by a defendant as a shield in defence of his right and not as a weapon of offence as intended in the present case”. The cases cited by the learned Mr. Chaudhry state as much. In Taj Muhammad v. Yar Muhammad Khan it was held, that “It is true that section 53-A does not confer or create any right but it provides a defence to a transferee to protect his possession.”

14. In the case of Gokarakonda Audinarayudu v. Surapureddi Mangamma AIR 1943 Mad 706 the principle was applied to a judgment creditor, with it being held that:

“The expression “claiming under the transferor” is wide enough in S. 53A to include a judgment-creditor in the situation in which the appellant in this appeal now stands. On the facts, as already stated, the claim of the respondent based upon S. 53A has been accepted and there can be no interference in this matter in second appeal.”

15. In the case of Vannarakkal Kallalathil v. Chandramaath Balakrishnan 1990 SCC (3) 291, it was held by the Supreme Court of India as follows:-

“7. Hence, under a contract of sale entered into before attachment, the conveyance after attachment in pursuance of the contract passes on good title inspite of the attachment. To the same effect are the decisions of the Bombay High Court in Rango Ramachandra Kulkarni v. Gurlingappa Chinnappa Muthal and Yashvant Shankar Dunakhe v. Prayarji Nurji Tamboli. The High Court of Travancore-Cochin in Kochuponchi Varughese v. Ouseph Lonan, has also adopted the same reasoning.”

16. Referring to that judgment, the Indian Supreme Court subsequently went on to elaborate in the case reported as *Kancherla Lakshminarayana vs Mattaparthi Syamala & Ors* (2008) 14SCC 258 that:

“Again, it cannot be said that the present appellant has no locus standi to raise an objection to the sale for the simple reason that he had filed a suit on the basis of an Agreement of Sale. The factum of the Agreement of Sale was not denied by the second respondent. Therefore, whether the Agreement of Sale was a good Agreement of Sale entitling the appellant for specific performance on the basis of that agreement is essentially a question to be decided subsequently in the suit (though the suit is earlier to the suit filed by the first respondent). Under such circumstances there was a cloud on the property and a person like appellant who had the obligation qua the property in the shape of an Agreement of Sale could not be held to be an utter outsider having no locus standi to take the objections. This is the import of the aforementioned decision in *Vannarakkal Kallalthil Sreedharan's* case. To the same effect is the judgment in *Purna Chandra Basak v. Daulat Ali Mollah* [AIR 1973 Cal. 432] where the learned Single Judge of that Court has held:

"An attaching creditor can only attach the right, title and interest of his debtor at the date of the attachment and on principle, his attachment cannot confer upon him any higher right than the judgment-debtor had at the date of the attachment. If a person, having a contract of sale in his favour, has such pre-existing right the attachment could not be binding upon him. If the promise get a conveyance, after the attachment, in pursuance of his contract, he takes a good tile inspite of the attachment. "

The observations would only highlight the importance of the Agreement of Sale which is prior in time of the attachment as also the unconfirmed sale.”

17. Furthermore, as to the scope of an investigation under Order 21, Rule 58 CPC, in the case reported as Ramaswami Goundan and Ors. v. Karuppa Mudali AIR 1928 Madras 163, it was held by the High Court that:

“In investigating the claim preferred by the claimants, the only questions which the Court is competent to consider are whether the property when it was attached was in the possession of the judgment-debtor as his own property; if such property was in the possession of some other person, whether it was in his possession in trust for the Judgment-debtor, or in the claimant’s occupation as the tenant of the judgment-debtor. In this case it is not upon any of these grounds that the claim has been disallowed, but it is upon the finding that the title to the properties was in Nallasami Goundan exclusively and on his death the properties have come to his wife and daughters under a settlement made by him. An investigation of such questions of title to the properties is entirely beyond this scope of the investigation directed by the Code when a claim to attached properties is preferred.”

18. Under the given circumstances, we are view that the Courts below have adopted an overly restricted approach on the touchstone of Section 54 of the Act while failing to consider the principles otherwise laid down in the aforementioned case law. Hence, the impugned Orders made by the fora below on 12.05.2012 and 30.07.2012 respectively cannot sustain. That being so, without expressing any view on the merits of the Petitioner’s claim, we hereby allow the Petition so as to set aside both the aforementioned Orders and remand the matter to the executing Court for decision afresh on the underlying Applications.

JUDGE

CHIEF JUSTICE