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KERALA HIGH COURT EXPLAINS PROCEDURAL MECHANISM OF LIFTING AN ENCUMBRANCE UNDER SECTION 57 OF THE TRANSFER OF PROPERTY ACT, 1882

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On 5 August 2020, the Kerala High Court (High Court), in its decision in *MP Varghese v Annamma Yacob & Ors (MFA No 47/2020)* (MP Varghese Case), explained with considerable clarity the procedural mechanism to lift an encumbrance from an immovable property under Section 57 of the Transfer of Property Act 1882 (TPA), which provision has till date been rarely espoused in reported judgments in India.

Factual Background

The appellant and the second respondent were siblings who had received the property of their father through a registered partition deed in 1980 (Partition Deed). The Partition Deed contained a covenant that both the brothers must pay a sum of INR 500 each to their sister, that is, the first respondent, within one year of the Partition Deed, failing which the first respondent was allowed to recover it, for which purpose, the said amounts would stand charged on the respective properties of the appellant and the second respondent. While the first respondent accepted the payment from the second respondent, she refused to accept payment from the appellant due to her personal reasons, as a result of which the property allotted to him under the Partition Deed (Appellant's Property) was still burdened with this obligation.

Section 57 of the TPA enables a party to the sale of an encumbered immovable property to apply to the court for a declaration that the said property is freed from such encumbrance on deposit of sums as may be adjudged by the court in accordance with the Section and for issuance of a vesting order or an order of conveyance required to give effect to the sale.

In the first instance, the appellant had approached the District Court, Ernakulam (District Court) under Section 57 for effecting the sale free from encumbrance. The District Court disallowed the appellant's plea for discharge of encumbrance on the Appellant's Property holding it to be not maintainable.

Contentions of the Parties

The appellant argued that Section 57 of the TPA applied to 'out of court' sales too, that is, sale transaction which are not ordered by the court, as is manifested by the use of the words 'or out of court' in Section 57(a) of the TPA. The appellant prayed that since the amount of INR 500 was fixed and did not include any additional charges or interest, the sum must be treated as a capital sum, and he should be allowed to invoke Section 57 of the TPA. The appellant prayed that the impugned order of the District Court be set aside, and the High Court permit him to deposit the amount of INR 500 favouring

the first respondent and declare that the Appellant's Property is free of the said encumbrance.

The first respondent submitted that Section 57 of the TPA could not apply to out of court sales and the appellant must discharge the debt according to the provisions of Chapter IV of the TPA which deals with mortgages of immovable properties and charges. It was further submitted that the first respondent was not willing to accept the money due to deep-seated conflict with her brother, the appellant. The first respondent however did not challenge the validity or effectiveness of the Partition Deed and further admitted that the Partition Deed only charges the Appellant's Property to the sum of INR 500 and nothing more.

Findings of the High Court

The High Court, while examining Section 57 of the TPA meticulously from both its academic and practical ambits described it as *"a very efficacious, substantive and procedural mechanism to facilitate the realization of the deserving and intrinsic value of encumbered estates and other immovable properties"*. After noting how Section 57 of TPA has been adapted from Section 5 of the English Conveyancing and Law of Property Act, 1881 (English Act) (which, subsequently, was replaced by Section 50 of the Law of Property Act, 1925) and the fact that there are hardly any reported precedents touching this Section in India, the High Court examined the various cases in which the English Courts have dealt with the analogous provision. The High Court explained that the object of Section 57 was to enable a sale to be effected and the property to be transferred to the purchaser so that the purchaser may get a full and complete title to it without causing too much disturbance to the vested rights or other rights more than is necessary since the purchase of land subject to an incumbrance is not usually a desirable investment. The High Court distinguished the role of the court in 'court sales' in which the court can 'direct' payment and the role of the court in 'out of court' sales in which the court can 'allow' payment, and concluded, that Section 57 of TPA is intended to facilitate sale out of court, as much as it is for sale by a court or in execution of a decree.

The High Court further struck down the erroneous interpretation by the District Court to the extent that the Section 57 can be invoked only after the sale is over and instead clarified unequivocally that assistance of the court can be sought even while the sale is proposed.

Applying the aforementioned legal principles the High Court allowed the appeal and set aside the impugned order of the District Court, consequently, permitting the appellant to tender the amount of INR 500 to the first respondent, by depositing it in the District Court; in which event, the same will be entitled to be withdrawn by her. The High Court further declared that on such payment by the appellant, the Appellant's Property will stand freed from the charge on it, created in pursuance of the terms of the Partition Deed.

Comments

The decision of the High Court in the *MP Varghese* Case assumes great significance since, in the words of the High Court, Section 57 of the TPA has rarely been invoked in Courts and the case law on the subject is scarce.

Section 57 of the TPA aims to facilitate the realization of a fair value for properties when they are subject to any encumbrance and may not be otherwise sold for their fair intrinsic value. The Section enables the parties to a sale to invoke the assistance of the court for the purpose of fulfilling their contracts. It must be borne in mind that the Court can act under this Section only on an application of a party to the sale, and not on its

own motion. The Court has a discretion in the matter, whether to act under the Section or not.

This case comes as a silver lining for parties who have been contemplating sale transactions of properties which are subject to encumbrance, since they would now be inclined to invoke Section 57 of the TPA to seek permission for declaring a property free of encumbrance even against the will of the encumbrancer. Most real estate developers are not amenable to deal with properties which are encumbered. The decision of the High Court may prove to be a watershed moment for the real estate sector, as it paves the way for completion of a lot of sale transactions which were hitherto stalled due to encumbrances of various nature affecting the concerned immovable properties and the disinclination of the encumbrancer to execute a discharge in respect of such encumbrances.

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