

Kanhaiyalal

Vs

Dr. D. R. Banaji and Others

Civil Appeal No. 128 of 1954

(K. Subha Rao, B. P. Sinha, Syed Jafar Imam JJ)

31.03.1958

JUDGMENT

SINHA J. -

The main question in controversy in this appeal on a certificate of fitness granted by the High Court of Judicature at Nagpur (as it then was), is whether the provisions of the Berar Land Revenue Code, 1928 (which will hereinafter be referred to as the Code), bar the suit out of which this appeal arises.

In order to appreciate the points in controversy in this appeal, it is necessary to state the following facts : One Bhagchand Jairamdas was the occupant of a plot, situated in the District town of Yeotmal in what was then called the Province of Central Provinces and Berar, measuring 1,91,664 square feet in area, on which stood a ginning factory and its appurtenant buildings. Bhagchand aforesaid had executed a mortgage-bond in favour of one Abubakar. The mortgagee aforesaid instituted a suit on the original side of the Bombay High Court, being Civil Suit No. 1543 of 1934, to enforce the said mortgage. A Receiver was appointed on October 20, 1936, during the pendency of the suit in respect of the mortgaged properties including the plot described above. The land and the buildings and the factory, have been valued by the courts below at about Rs. 70,000. The revenue payable in respect of the plot in question, at the rate of Rs. 129 per year, appears to have remained in arrears for two years, namely, 1936-37 and 1937-38. The Sub-Divisional Officer of Yeotmal, functioning as the Deputy Commissioner under the Code, sold at auction the plot in question, free of all encumbrances, on December 17, 1937, without impleading or giving notice to the Receiver who was in-charge of the estate of Bhagchand, as aforesaid. At that auction, Kanhaiyalal, the appellant, purchased the property for Rs. 270 only. The sale in his favour was confirmed on January 26, 1938, but it appears that the then Receiver had sent Rs. 275 by a cheque to the Sub-Divisional Officer concerned, in full payment of the arrears of land revenue, and thus, to have the sale set aside. But it was received two days after the confirmation of the sale. Before the confirmation of the sale, the Receiver had made an application on January 19, 1938, to the Sub-Divisional Officer, offering to pay the arrears, but it appears that through some bungling in the office, the attention of the Sub-Divisional Officer was not drawn to the application until after the confirmation of the sale. The Receiver then applied for a review of the order confirming the sale, and the Sub-Divisional Officer allowed the application and set aside the sale. The Deputy Commissioner, Yeotmal, and the Commissioner, Berar, also upheld the order setting aside the sale. Thereupon, the auction-purchaser, Kanhaiyalal, moved in revision the Financial Commissioner who was then the highest Revenue authority under the Code, against the order of the Commissioner, and ultimately, the order setting aside the sale, was vacated by the Financial Commissioner on the ground that there was no application under section 155 or section 156 of the Code.

The then Receiver, having ultimately failed in having the sale of the valuable properties by the revenue authorities, set aside, instituted the suit out of which this appeal arises, impleading the Provincial Government of Central Provinces and Berar, as the first defendant, Kanhaiyalal, the auction-purchaser, as the second defendant, and Dulichand Bhagchand as the third defendant. He prayed for a declaration that the auction-sale held on December 17, 1937, was void, on a number of grounds including the grounds that no notice of demand had been sent to the Receiver who was in-charge of the property; that the attachment and sale proclamation had not been effected according to law, and that though the revenue authorities were aware of the appointment of a Receiver of the property, by the Bombay High Court, they did not implead the Court Receiver. This suit was contested on the preliminary ground that it was barred by the provisions of sections 157 and 192 of the Code. That plea found favour, both, with the trial court and the court of appeal (Additional District Judge, Yeotmal). On second appeal to the High Court of Judicature at Nagpur, the case was heard by a Single Judge, Niyogi J. who allowed the appeal by judgment dated March 29, 1945. On a Letters Patent appeal by the auction-purchaser, Kanhaiyalal, the matter was heard by a Division Bench (Mangalmurti and Deo JJ.) The bench affirmed the decision of the learned Single Judge, and held that the suit was not barred. Hence, this appeal.

It was urged on behalf of the appellant, the auction-purchaser, who was the second defendant in the suit, and who only is interested in having the sale in question, sustained by the Court, that the sale without notice to the Receiver or without impleading him, was not void but only irregular, and secondly, that in any event, the suit was barred by the provisions of sections 157 and 192 of the Code. The first defendant, the State Government, which was represented by Mr. Dhebar, prayed that, in any event, there should be no order for costs either in favour of or against the Government.

On behalf of the plaintiff-respondent, it was urged that property in the hands of a Receiver is custodia legis, and is exempt from all judicial processes except to the extent that the Court which has appointed the Receiver, may accord permission to the Receiver or to third parties to institute proceedings in respect of the property; that no permission of the Bombay High Court which had appointed the Receiver, having been taken for the sale of the property, the sale held without such a permission, is a nullity; that, at any rate, such a sale was not a mere irregularity but an illegality and could be avoided by suit; that there being no valid attachment of the property with notice to the Receiver, the attachment itself was illegal, and on that ground also, the sale was void; and lastly, that the suit was not barred by the provisions of the Code, as held by the High Court.

The facts as set out above, are not in controversy. During the time that the proceedings culminating in the sale of the property, had been pending in the Revenue Courts, the Receiver was in effective control and management of the property. The revenue authorities had been apprised of the fact that the Receiver appointed by the Bombay High Court, was in-charge of the property. As a matter of fact, an attempt had been made by the revenue authorities, in the first instance, to approach the Collector of Bombay for realising the arrears of land revenue in respect of the plot in question, but the mistake was that no approach was made to the Bombay High Court or even to the Receiver for paying up the arrears of the Government demands. It was certainly the duty of the Receiver to see to it that all public demands in respect of the properties in his charge, were paid in due time, and in this case, certainly, the arrears in respect of the year 1937-38, which fell due in August, 1938, accrued in his time, if not also the arrears in respect of the previous year 1936-37. If the Receiver had been more vigilant, or if the revenue authorities had made the demand from the Receiver in respect of the arrears, they may have been paid up in due course without the necessity of putting the property to sale.

So far as the Indian Courts are concerned, it is settled law that a sale held without making attachment of the property, or without duly complying with the provisions of the law relating to attachment of property, is not void but only voidable. Rule 52 of O. 21 of the Code of Civil Procedure, requires that where the property is in the custody of any court or Public Officer, attachment shall be made by a notice to such court or officer. But the absence of such a notice would not render the sale void ab initio, because the jurisdiction of the court or the authority ordering the sale, does not depend upon the issue of the notice of attachment. It is also settled law that proceedings taken in respect of a property which is in the possession and management of a Receiver appointed by Court under O. 40, r. 1 of the Code of Civil Procedure, without the leave of that Court, are illegal in the sense that the party proceeding against the property without the leave of the Court concerned, is liable to be committed for contempt of the Court, and that the proceedings so held, do not affect the interest in the hands of the Receiver who holds the property for the benefit of the party who, ultimately, may be adjudged by the Court to be entitled to the same. The learned counsel for the respondent was not able to bring to our notice any ruling of any Court in India, holding that a sale held without notice to the Receiver or without the leave of the Court appointing the Receiver in respect of the property, is void ab initio. In the instant case, we do not think it necessary to go into the question raised by the learned counsel for the respondents that a sale of a property in the hands of the Court through its Receiver, without the leave of the Court, is a nullity. The American Courts appear to have taken the view that such a sale is void. In our opinion, it is enough to point out that the High Court took the view that the sale was voidable and could be declared illegal in a proper proceeding or by suit. We shall assume for the purposes of this case that such a sale is only voidable and not void ab initio.

On the assumption that the sale held in this case without the leave of the Court and without notice to the Receiver, is only voidable and can be declared illegal on that very ground, the suit had been instituted for the declaration that the sale by the revenue courts was illegal. The plaint was subsequently amended by adding the relief for recovery of possession, because in the meanwhile, the auction-purchaser had obtained delivery of possession of the property through the revenue authorities, some time in 1940. The general rule that property in custodia legis through its duly appointed Receiver is exempt from judicial process except to the extent that the leave of that court has been obtained, is based on a very sound reason of public policy, namely, that there should be no conflict of jurisdiction between different Courts. If a court has exercised its power to appoint a Receiver of a certain property, it has done so with a view to preserving the property for the benefit of the rightful owner as judicially determined. If other Courts or Tribunals of co-ordinate or exclusive jurisdiction were to permit proceedings to go on independently of the Court which has placed the custody of the property in the hands of the Receiver, there was a likelihood of confusion in the administration of justice and a possible conflict of jurisdiction. The Courts represent the majesty of law, and naturally, therefore, would not do anything to weaken the rule of law, or to permit any proceedings which may have the effect of putting any party in jeopardy for contempt of court for taking recourse to unauthorised legal proceedings. It is on that very sound principle that the rule is based. Of course, if any Court which is holding the property in custodia legis through a Receiver or otherwise, is moved to grant permission for taking legal proceedings in respect of that property, the Court ordinarily would grant such permission if considerations of justice require it. Courts of justice, therefore, would not be a party to any interference with that sound rule. On the other hand, all Courts of justice would be only too anxious to see that property in custodia legis is not subjected to uncontrolled attack, while, at the same time, protecting the rights of all persons who may have claims to the property.

After making these general observations, we have to examine the provisions of the Code, to find out

how far that general rule of law is affected by those provisions. The Berar land Revenue Code provides that "land revenue assessed on any land shall be a first charge on that land and on the crops, rents and profits thereof" (section 131). Section 132 makes the occupant in respect of the land in question "primarily liable for the payment of the land revenue", but section 133 provides that in case of default of payment of land revenue by the person who is 'primarily liable', "the land revenue including arrears shall be recoverable from any person in possession of the land." Hence, in this case, the revenue authorities could legally call upon the Receiver to pay the arrears of land revenue, and as pointed out above, it would have been the duty of the Receiver to pay up those arrears. Under section 135, the Receiver would be deemed to be a 'defaulter' in respect of the land revenue. Section 140 makes the statement of account, certified by the Deputy Commissioner or the Tahsildar, conclusive evidence of the existence of the arrears and of the person shown therein as the defaulter, for the purposes of the Chapter in which the section finds a place, namely, Chapter XII, headed as "Realization of Land Revenue". One of the modes laid down in section 141(c) of the Code for the recovery of arrears of land revenue, is "attachment and sale of the holding on which the arrear is due." If a sale is held under the provisions of section 141(c), section 149(2) provides that such a sale "shall transfer the holding free of all encumbrances imposed on it....". Thus, the appellant, if the sale in his favour was a valid one, acquired the property said to be worth Rs. 70,000, free from all encumbrances including the mortgage-money due on the property, and for which the suit in the Bombay High Court had been instituted, even though he paid Rs. 270 only for it.

The principal question for determination in this appeal, therefore, is whether, in view of the special provisions of the Land Revenue Code, the present suit could be entertained by the civil court. It is beyond question that the Code lays down a special machinery for the realisation of Government revenue which has been declared as the paramount charge on the property. It lays down a summary procedure for the realisation of public revenue, and all questions coming within the purview of the Code, must be determined according to the procedure laid down in that Code. Hence, in so far as the Code has laid down specific rules of procedure, those rules and no others, must apply in the determination of all controversies coming strictly within the terms of the statute. One thing is absolutely clear, namely, that the Code does not lay down any specific rules in respect of property which has been placed in custodia legis. The Code contemplates regular payment of government revenue by the owner, possessor or the occupant of the property in respect of which Government revenue is payable. It also takes notice of devolution of interest by transfer or succession, but it does not contemplate the inter-position of a Receiver in respect of the property subject to the payment of Government revenue. This aspect of the matter becomes important because the only point for determination in this appeal, is whether the auction-sale held under the Code, without the leave of the Court or without notice to the Receiver appointed by the Court, should affect the interest which the Bombay High Court had, by appointing the Receiver, sought to protect, if the sale in favour of the appellant, stands. The mortgagee's security for the payment of the mortgage-debt, in the event of the auction-sale being sustained, is to that extent adversely affected without his having any voice in the matter. Perhaps, if the Receiver were not there, the mortgagee may have been more vigilant and may have taken timely steps to pay the Government demand in respect of the property if only for conserving it for satisfying his own dues on the mortgage. It has been strenuously argued on behalf of the appellant that the present suit cannot be maintained in view of the provisions of the Code, particularly, sections 157 and 192 which we now proceed to examine. Section 157 is in the these terms :

"157. (1) If no application under section 156 is made within the time allowed therefor, all claims on the ground of irregularity or mistake shall be barred.

(2) Nothing in sub-section (1) shall bar the institution of a suit in the civil court to set aside a sale on the ground of fraud or on the ground that the arrear for which the property is sold was not due."

This section makes reference to proceedings under the previous section 156. Section 156 contemplates an application for setting aside the sale "on the ground of some material irregularity or mistake in publishing or conducting it", at the instance of a person "whose interests are affected by the sale". Assuming that in the instant case, the Receiver is a person whose interest can be said to have been affected by the sale, the ground on which he could have moved the Revenue authorities for setting aside the sale, was limited to material irregularity or mistake in publishing or conducting the sale. This provision proceeds on the assumption that the necessary parties have been apprised of the proceedings relating to the realization of Government revenue. It assumes that the proceedings have been properly taken, but there may have been some material irregularity or mistake at a later stage of the proceedings, namely, in publishing or conducting the sale. It is clear that the ground on which the present suit is based, would not be covered by the crucial words quoted above, on which alone section 156 could be availed of. "Publishing" the sale has reference to that part of the proceedings which relates to the sale proclamation, and 'conducting' the sale has reference to acts or omissions, at a still later stage, of some officer or public authority who is entrusted with holding the sale. It is clear, therefore, that the provisions of section 156 are out of the way of the plaintiff in this suit. So also are the provisions of section 155 which relate to an application for setting aside a sale on deposit of arrears within 30 days from the date of the sale. An application under section 155 can only be made by a person "either owning such property or holding an interest therein by virtue of a title acquired before such sale". A Receiver appointed under O. 40 of the Code of Civil Procedure, unlike a Receiver appointed under the Insolvency Act, does not own the property or hold any interest therein by virtue of a title. He is only the agent of the court for the safe custody and management of the property during the time that the court exercises jurisdiction over the litigation in respect of the property. Section 157(1) of the Code, which positively bars a suit, is in express terms, confined to "all claims on the ground of irregularity or mistake". It does not cover grounds other than those - for example, if a sale is attacked on the ground that the owner of the property was dead at the date of the sale, or that there had been some fraud in connection with the sale proceedings, or that he had been kept out of his remedy under the Code by some fraudulent act, or that there was really no arrear due in respect of the property sold, or such allied grounds - suits based on grounds like these, would not be within the prohibition of section 157(1). Section 157(2) specifically saves certain suits of the kind referred to therein, but it does not necessarily follow that suits not directly within the terms of sub-section (2) of section 157, are covered by the provisions of the positive bar laid down by section 157(1). There may be a tertium quid between the grounds covered by section 157(1) and section 157(2). It is clear that the present suit is not covered either by the terms of section 157(1) or those of section 157(2). As already indicated, the position emerging in the present controversy, is not covered by the express provisions of section 157.

But it has been argued on behalf of the appellant that even though the provisions of section 157 do not cover the ground raised in the present suit, section 192(1) of the Code, bars the suit. Section 192(1) is in these terms :

"192. (1) Except as otherwise provided in this Law, or in any other enactment for the time being in force, no civil court shall entertain any suit instituted or application made to obtain a decision or order on any matter which, the Provincial Government or any Revenue Officer is, by this Law, empowered to determine, decide or dispose of; and in particular and without prejudice to the generality of this provision, no civil

court shall exercise jurisdiction over any of the following matters :-"

It is not necessary to set out the clauses (a) to (p) under sub-section (1) of section 192, because none of those clauses, has been claimed clearly to cover the present suit.

Learned counsel for the appellant contended that setting aside a sale has been specifically provided for by the Code, which the several authorities under the Code have been empowered to determine, decide or dispose of, within the meaning of the section. There is no doubt that the matter of the setting aside of a sale by payment of the arrears under section 155, and on the specific grounds under section 156, as discussed above, has been provided for in the Code, but, as already observed, the suit does not raise any ground which is covered by the specific provisions of the Code for setting aside a sale. Strictly speaking, this is a suit for a declaration that the sale held by the revenue courts, does not affect the interests which are in the custody of the Court through its Receiver, and for recovery of possession as against the auction-purchaser who is alleged to be in wrongful possession of the property which should have continued in possession of the Receiver, under the directions of the Bombay High Court. In short, this is not a suit simpliciter to set aside the sale held by the revenue authorities but a suit for a declaration and a consequential relief. A suit for such a declaration on the grounds taken by the Receiver and for possession, is not a matter, which the several authorities under the Code, have been empowered to determine, decide or dispose of.

But the learned counsel for the appellant further contended that section 192 takes in its sweep all the relevant provisions of the Code bearing on the rights of the Receiver to have a sale set aside. Undoubtedly, it is so, but, as pointed out above, the Receiver could not have brought the present controversy within the terms of any one of those sections. In this connection, reliance was also placed on the provisions of sections 32, 38 and 159 of the Code. In our opinion, those sections have no bearing on the present controversy. Section 32 deals with appeals and appellate authorities, and lays down the hierarchy of officers to deal with and appeal. Section 38 prescribes the authorities to deal with revisional matters, and section 159 conserves the power of the Deputy Commissioner to pass orders suo moto that is to say, where no application has been made under section 155 or section 156, or even beyond the period of thirty days, which is the prescribed period for making applications under those sections. Thus, if the leave of the Bombay High Court had been taken to initiate proceedings under the Code, for the realization of Government revenue, or if the Receiver had been served with the notice of demand, it would have been his bounden duty to pay up the arrears of land revenue and to continue paying Government demands in respect of the property in his charge, in order to conserve it for the benefit of the parties which were before the Court in the mortgage suit. If such a step had been taken, and if the Receiver, in spite of notice, had allowed the auction-sale to be held for non-payment of Government demands, the sale would have been valid and subject only to such proceedings as are contemplated under sections 155 and 156 of the Code. In that case, there would have been no conflict of jurisdiction, and therefore, no question of infringing the sound principle discussed above. But the absence of the leave of the Court and of the necessary notice to the Receiver, makes all the difference between a valid and an illegal sale. The High Court has also relied upon the well-known rule of natural justice - *audi alteram partem* - as another reason for holding the sale to be illegal. It is not necessary or the purposes of this case to pronounce upon the difficult question of how far a principle of natural justice can override the specific provisions of a statute.

For the reasons given above, we agree with the High Court in its conclusion that the auction-sale impugned in this case, was illegal, and that the suit was not barred by the provisions of the Code. The appeal is, accordingly, dismissed with costs to the Receiver who alone has contested the appeal.

Appeal dismissed.

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