Jibon Krishna Mukherjee & Another

Vs

New Bheerbhum Coal Co. Ltd & Another

Civil Appeal No. 342 of 1959

(P. B. Gajendragadkar, K. Subha Rao, J. C. Shah JJ)

10.11.1959

JUDGEMENT

GAJENDRAGADKAR J. –

The principal question which this appeal by special leave raises for out decision is : Whether the provisions of O. 21, r. 89 of the Code of Civil Procedure apply to a sale held by a receiver appointed by the court and authorized to sell the property in question. The learned Single Judge on the Original Side of the Calcutta High Court as well as the Division Bench of the said High Court have answered this question in the negative. The appellants contend that the view taken by the Calcutta High Court is erroneous.

This question arises in this way. In Suit No. 1024 of 1953 on the Original Side of the Calcutta High Court a decree for the payment of Rs. 18,497-15-0 was passed by consent in favour of the New Bheerbhum Coal Co. Ltd., (hereinafter called respondent 1) and against the Benares Ice Factory Ltd., (hereinafter called appellant 2) on December 5, 1955. The decree provided for the payment of the decretal amount by six equal instalments and it directed that in case of default of any one of the instalments the balance of the decretal dues would at once become payable. A first charge was created by the decree on the plant and machinery of appellant 2 for securing the payment of the decretal amount. A default having occurred in the payment of instalments respondent 1 applied for the execution of the decree on April 10, 1956. On this application an interim order was made on May 17, 1956, appointing Mr. A. K. Sen, as Receiver of the properties charged. The said application was finally decided by an order passed on May 30, 1956, by which the appointment of the receiver was confirmed and he was given liberty to sell the said properties either by private treaty or by public auction. It is common ground that the receiver took possession of the said property in December 1956.

Subsequently, on March 10, 1958, the receiver entered into an agreement with Sukhlal Amarchand Vadnagra (hereinafter called respondent 2) for the sale of the said property for Rs. 30,000. The terms and conditions embodied in the said agreement provided inter alia that within one month from the date of the receipt by the purchaser of intimation from the receiver that the sale had been confirmed by the High Court the purchaser shall deposit with the said receiver the full price of Rs. 30,000. On March 31, 1958, respondent I applied to the court for confirmation of the said agreement and on May 9, 1958, G. K. Mitter, J., allowed the application. He ordered that the appellants should deposit the sum of Rs. 3,000 with the attorneys of the decreeholder towards its claim under the said decree and further directed that if the said amount was paid within the time aforesaid and the balance of the decretal amount was paid within ten weeks thereafter the agreement of sale shall not be confirmed. The order further provided that in default of the appellants paying the

amounts as directed within the respective due dates the sale of the charged property by the receiver to the second respondent as set out in the agreement shall be confirmed.

Pursuant to this order the appellants deposited with the attorneys of the decreeholder Rs. 3,000 on May 30, 1958. They had also paid to the receiver Rs. 3,500 in August, 1957, towards the decretal dues. It appears that when the appellants were unable to pay the balance as directed by the court appellant 2 applied to the court praying that the agreement of sale should be cancelled and the time within which he was directed to pay the balance of the decretal amount should be extended. The application also sought for certain other directions. G. K. Mitter, J., who heard this application dismissed it on July 29, 1958, and confirmed the agreement of sale.

On August 20, 1958, appellant 2 took out a notice of motion of an application made by him on the same day praying that leave may be granted to him to deposit the whole of the balance of the decretal amount and that the receiver should be restrained from receiving any money from the intending purchaser in terms of the agreement of sale. It appears that on August 22, 1958, respondent 2 tendered a cheque for Rs. 30,000 to the receiver towards the payment of the purchase money under the agreement of sale. Soon thereafter, however, respondent 2 took back the cheque and paid Rs. 30,000 in cash on September 1, 1958. The application made by appellant 2 for leave to pay the balance of the decretal amount was dismissed by G. K. Mitter, J., on September 4, 1958. The learned judge, however, stayed the delivery of possession of the property to respondent 2 for a week from the date of his order.

The appellants then filed an appeal against the order of the learned judge before a Division Bench of the High Court and obtained an order for stay of delivery pending the decision of the appeal. On April 29, 1959, the Division Bench dismissed the appeal and refused to grant certificate to the appellants to file an appeal in this Court. The appellants then applied for and obtained special leave from this Court on May 20, 1959. That is how this appeal has come before us; and the main point which Mr. Sanyal, for the appellants, has raised for our decision is that the courts below were in error in refusing to give relief to the appellants under O. 21, r. 89 on the ground that the said rule was inapplicable to the sale held by the receiver.

It is common ground that the receiver was appointed with "power to him to get in and collect the outstanding debts and claims due in respect of the charged property and with all powers provided for in O. 40, r. 1, cl. (d) of the Code of Civil Procedure". The order appointing the receiver also expressly directed that the receiver shall be at liberty to sell the said property charged in favour of respondent I either by private treaty or by private auction to the best purchaser or purchasers that can be got for the sale but he shall not hold such sale before the 13th day of August, 1956. In other words, the receiver was appointed in execution proceedings under s. 51 and was given all the powers under O. 40, r. 1(d) of the Code. It is by virtue of those powers that he entered into the agreement of sale with respondent 2 and sold the property to him and gave him its possession. Section 51 which deals with the powers of the court to enforce execution provides for the execution of the decree by five alternative modes specified in cls. (a) to (e). One of the modes of execution is the appointment of a receiver which means that a decree for the payment of money can be executed by the appointment of a receiver. He may either collect the income of the property belonging to the judgment-debtor and thereby satisfy the decree, or if so authorised he may sell the property of the judgment-debtor and thereby arrange for the satisfaction of the decree. Thus, in dealing with the question as to whether the sale held by the receiver is a sale ordered by the court to which O. 21, r. 89 applies it is necessary to remember that the appointment of the receiver itself is a mode of execution of the decree.

When the receiver so appointed is given all the powers under O. 40, r. 1(d) it is these powers which he seeks to exercise when selling the judgment-debtor's property in execution of the decree. The sale held by the receiver under such conditions would no doubt be governed by the provisions of O. 40, and the court may supervise or issue directions in respect of such a sale under the provisions of the said order. Prima facie the sale held by the receiver appointed in execution proceedings in pursuance of the powers conferred on him under O. 40, r. 1(d) would be governed by the powers conferred on him and the terms and conditions on which the said powers may have been conferred and by other relevant provisions of O. 40. It does not seem to attract the provisions of O. 21.

Courts have had occasion to consider questions about the applicability of several provisions of O. 21 to sales held by receivers and opinions expressed on such questions have differed more particulary in the Calcutta High Court as we will presently indicate. In the present appeal we do not propose to consider or decide the general question about the character of the sale held by the receiver nor do we propose to attempt to specify which provisions of O. 21 will apply to such sales and which will not. We are dealing with the narrow question as to whether O. 21, r. 89 applies to such a sale; and it is to the decision of this narrow question that we will address ourselves in the present appeal.

Order 21, r. 89 enables the persons specified in sub-r. (1) to apply to have the sale held in execution proceedings set aside on two conditions, (a) the applicant must deposit for payment to the purchaser a sum equal to 5% of the purchase money, and (b) for payment to the decreeholder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered less any amount which may since the date of such proclamation of sale have been received by the decreeholder. The second requirement immediately raises the question as to whether it is necessary for the receiver in selling immoveable property in execution proceedings to issue a proclamation as required by O. 21, r. 66 of the Code. In our opinion there can be no doubt that the provisions of the said rule do not apply to sales held by receivers. No decision has been cited before us where a contrary view has been expressed. The provisions of the said rule apply where property is ordered to be sold by public auction in execution by the court, and the order for the sale of such property mist be made by any court other than the court of Small Causes as provided by r. 82. Where the court appoints a receiver and gives him liberty to sell the property the receiver may either sell the property and thereby realise the money for the satisfaction of the decree, or he may, even without selling the property, seek to satisfy the decree by the collection of rents due from the property or other ways open to him under the law. In such a case it is difficult to hold that by the very appointment of the receiver clothing him with the power to sell the property if he thought it necessary to do so the court had ordered the sale of the said property within the meaning of O. 21, r. 82. If the provisions of r. 66 of O. 21 are inapplicable to sales held by receivers it is obvious that the second condition prescribed by r. 89(1)(b) is equally inapplicable and it is undoubtedly one of the two essential conditions for the successful prosecution of an application under the said rule. In our opinion this fact clearly emphasises the inapplicability of the whole rule to sales held by receivers. We are, therefore, satisfied that the High Court was right is refusing to entertain the appellants' application under O. 21, r. 89.

It is then argued that the High Court should have considered the appellants' prayer under s. 151 of the Code. It is no doubt a hard case where the appellants have to lose their property though presumably at the time when they made the present application in the High Court they were able to produce for the payment to the decreeholder the whole of the balance of the decretal amount. As the judgment of the Division Bench shows the learned judges themselves have observed that it was difficult not to feel sympathy for the appellants; but, on the other hand, it is clear from the record that the appellants were given enough opportunity to pay the decretal amount. The decree was

passed by consent and included a default clause. The appellants committed default and incurred the liability to pay the whole of the decretal amount. When the agreement of sale executed by the receiver came before the court another opportunity was given to the appellants to pay the decretal amount on the specified conditions. The appellants again committed a default. It is only later when it was too late that they rushed to the court with a prayer that they should be allowed to pay the decretal amount themselves and their property should be saved. Under such circumstances, if the learned judge who heard their application as well as the appellate court came to the conclusion that the court's jurisdiction under s. 151 cannot be invoked by the appellants, we do not see how we can interfere with the said decision. It is true that s. 151 is not specifically mentioned in the judgment of either of the courts below, but that must be obviously because no specific plea under s. 151 was raised. Even so the Division Bench has observed that it could not interfere with the order of the learned judge when in his discretion he refused to make an order as asked for by the appellants. This must inevitably refer to the discretion under s. 151, because if O. 21, r. 89 had applied and the appellants had satisfied the conditions prescribed by it there would be no discretion in the court to refuse such an application. It would then have been a right of the appellants to claim the sale should be set aside. We are, therefore, unable to accede to the plea raised before us by Mr. Sanyal under s. 151 of the Code.

There is another point which Mr. Sanyal attempted to raise. He contended that the sale had not been properly confirmed before he moved the court for leave to pay the decretal amount, and so the courts below were in error in not allowing his application. This argument is based on a decision of the Calcutta High Court in S. M. Sudevi Devi v. Sovaram Agarwallah ((1906) to C.W.N. 306). In that case Woodroffe, J., was dealing with a conditional decree which entitled the decreeholder, on the default of the defendent, to apply to the court which passed the decree to direct the ejectment of the defendant. It appears that when disputes arose between the decreeholder and the judgment-debtor in regard to the performance of the conditions imposed by the decree the decreeholder obtained an order for ejectment of the defendant without notice to the judgment-debtor. The judgment-debtor then applied for setting aside, modifying or reviewing the said order. Woodroffe, J., held that a court had inherent power to deal with an application to set aside an order made ex parte on a proper case being substantiated. Mr. Sanyal contends that the sale in the present case being conditional in the sense that it was subject to the confirmation by the court it was open to the court to refuse to confirm it when the appellants applied for leave to pay the balance of the decretal amount. This argument necessarily assumes that the order passed by Mitter, J., on May 9, 1958, was a conditional order. In our opinion this assumption is not well-founded. The said order no doubt gave an opportunity to the appellants to pay the decretal amount in the manner prescribed by it but it clearly provided that in default of the appellants complying with the said conditions within the respective due dates the sale of the property by the receiver to respondent 2 be confirmed and that the said receiver do make over possession of the said property to the said purchaser. It is clear that this order is not a conditional order at all. It is a composite order. It provided for the payment of the decretal amount by the appellants and in that sense gave an opportunity to the appellants to avoid the sale of their property; but, on the other hand, it also provided that on their default to comply with the order the sale do stand confirmed and the receiver do make over the possession of the property to the purchaser. Therefore, in our opinion, there is no scope for applying the principle laid down by Woodroffe, J., in the case of S. M. Sudevi Devi ((1906) 10 C.W.N. 306).

Before we part with this appeal we may very briefly indicate the nature of the divergence of views expressed in the Calcutta High Court on the question about the character of sales held by receivers appointed by courts to which our attention has been invited.

In Minatoonnessa Bibee & Ors. v. Khatoonnessa Bibee & Ors. ([1894] I.L.R. 21 Cal. 479), Mr. Justice Sale, held that the purchaser at a receiver's sale is entitled to obtain the assistance of the court in obtaining the possession under the provisions of the Code relating to sales in suits. In coming to this conclusion the learned judge referred to a precedent in the Calcutta High Court in that behalf, and made an order for possession of the property in favour of the receiver. It may be pointed out that the learned judge, in dealing with the question, has referred to the important fact that in that particular case the sale had been already treated as a sale by the court inasmuch, as the registrar had been directed under provisions of the Code to execute the conveyance on behalf of some of the parties to the suit. Thus the question was in a sense res judicata. However, in dealing with the general question the learned judge has no doubt observed that sales by receivers "are in all essential particulars similar to sales by the registrar, and that if they are sales by a civil court in a suit the procedure prescribed by the Code for sales in a suit would be applicable." We do not think that these observations should be divorced from the facts on the particular case with which the learned judge was dealing, and read as laying down a general proposition that sales held by receivers attract the application of all the provisions in the Code in regard to sales held by the court. If such a proposition was really intended to be laid down we would hold that it is not correct at least in regard to the provisions of O. 21, r. 89.

In Golam Hossein Cassim Ariff v. Fatima Begum ((1910) 16 C.W.N. 394) Mr. Justice Fletcher, has taken a contrary view. He has held that "a sale by a receiver under the direction of court is not a sale by court and in such a sale the court does not grant a sale certificate nor does it confirm the sale." The learned judge referred to the earlier decision of Sale, J., and dissented from him. It is unnecessary for us to consider the correctness or otherwise of this decision.

Fletcher, J., adhered to the same view in Jogemaya Dasee v. Akhoy Coomar Das ((1912) I.L.R. 40 Cal. 140). In that case the learned judge was dealing with the sale of properties by the Commissioner of Partition, and he held that such a sale is not one by the court but is one made by the Commissioner of Partition under the authority of the court.

Chaudhuri, J., considered the same question in Basir Ali v. Hafiz Nazir Ali ((1916) I.L.R. 43 Cal. 124) and held that in all sales whether by the court or under the court or by direction of the court out of court the purchaser is bound to satisfy himself of the value, quality and title of the thing sold just as much as if the were purchasing the same under a private contract. According to this decision the sales certificate does not transfer the title. It is evidence of the transfer. Accordingly, he directed the receiver to execute a conveyance in favour of the purchaser. This decision is not quite consistent with the view taken by Mr. Justice Fletcher.

In Rani Bala Bose v. Hirendra Chandra Ghose ((1948) 52 C.W.N. 739) Chakravarti, J., as he then was, has incidentally referred to this conflict of judicial opinion in the Calcutta High Court, and has indicated his preference for the view taken by Sale, J., though he has been careful enough to add that he was not deciding the point and that the case with which he was concerned was not covered by the actual decision of Fletcher, J.

These decisions show that there has been a divergence of opinion as to the character of the sale held by a receiver as to whether it is a sale by the court, or under the court, or under the directions of the court. It is because our attention has been invited to these decisions that we have thought it necessary to make it clear that our present decision is confined to the narrow question as to whether the sale held by a receiver attracts the provisions of O. 21, r. 89. We hold that r. 89 of O. 21 does not apply to such a sale and that the High court was right in rejecting the appellants' claim based on the

said rule.

The result is the appeal fails and is dismissed with costs.

Appeal dismissed.

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