

Mrs. V. G. Paterson

Vs

Mr. O. V. Forbes & Others

Appeal No. 170 of 1961

(J. L. Kapur, K. C. Das Gupta, Raghuvar Dayal JJ)

13.09.1962

JUDGMENT

DAS GUPTA, J. -

This appeal by special leave is against an order of the High Court at Allahabad rejecting on August 28, 1961 an application made by the present appellant. For a proper appreciation of the contention raised in the appeal it is necessary to set out in some detail the complicated facts which gave rise to her application.

It appears that on January 23, 1938 the appellant's mother Mrs. A. E. Forbes executed a will leaving all her property to her three children, viz., the appellant, Mrs. V. G. Paterson, Mrs. E. D. Earle and Mr. O. V. Forbes. The testatrix died on June 6, 1939 and this appellant applied for a probate. The probate was granted on November 30, 1939. On May, 4, 1943 when Criminal Appeal No. 9 of 1943 was being argued before a Single Judge of the Oudh Chief Court the Counsel for the State brought it to the notice of the Judge that Mr. O. V. Forbes - brother of the present appellant - had made in his application before the Trial Court and in other way certain aspersions against the conduct of the Trial Court which amounted to contempt of Court. The learned Judge ordered the issue of the notice against Mr. O. V. Forbes in this matter. On May 6, 1943 the present appellant also filed an application for similar action under the Contempt of Courts Act against her brother Mr. Forbes. On this also notice was issued to Mr. Forbes. As the notices are not on record we do not know the actual terms of the notice; but it does not appear to be disputed that by these notices Mr. Forbes was asked to appear before the Oudh Chief Court to show cause why he should not be proceeded against for contempt of court. Mr. Forbes however did not appear. Some time after this a bailable warrant appears to have been issued for the arrest of Mr. Forbes. The warrant was returned unexecuted. A registered notice was thereafter issued under the orders of the Court asking Mr. Forbes to attend the Oudh Chief Court on September 23, 1943. On that date also he did not appear. The learned Judges of the Chief Court being of opinion that Mr. Forbes was concealing himself only to avoid the execution of the warrant, made the following order :-

"Accordingly we order that action be taken under section 87 of the Code of Criminal Procedure against Mr. Forbes and direct the issue of a written proclamation requiring him to appear in this Court on the 25th November, 1943 at 10 a.m. This proclamation will be issued in strict accordance with the requirements of section 87 Cr. P.C. The proclamation will also be published once in the Pioneer of Lucknow and the Daily Statesman of Calcutta. Under section 88 of the Code of Criminal Procedure we further order attachment of the moveable and immoveable property belonging to Mr. Forbes within the jurisdiction of this Court including :-

1. G. P. Notes and bonds for Rs. 1,070,000/- in the hands of the Registrar of this Court.
2. Rs. 12,250/- deposited in this Court in the Personal Ledger, Trustees and Stake Holders Fund;
3. G.P. Notes belonging to Mr. Forbes of the face value of Rs. 55,000/- attached in Execution Case No. 16 of 1942 in the Court of the Civil Judge, Lucknow :

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The proclamation was duly published and certain property was attached on the basis that it was the property of Mr. O. V. Forbes. On March 30, 1944, the Oudh Chief Court recorded an order stating that as Mr. Forbes did not appear within that time specified in the proclamation and under sub-section (7) of s. 88 of the Code of Criminal Procedure the property under attachment was at the disposal of the Provincial Government. As regards the two applications for contempt the Court made the following order; "These applications will therefore be adjourned sine die until Mr. Forbes appears or is arrested." On September 21, 1944, the Court made an order withdrawing the prohibitory order it had earlier issued against the Registrar and the Civil Judge, Lucknow.

It appears that after the Oudh Chief Court made the order on March 30, 1944 stating that the attached property was at the disposal of the Provincial Government under sub-section 7 of s. 88 of the Code of Criminal Procedure the Provincial Government directed the City Magistrate to take suitable action for the disposal of the attached property. It was to facilitate such action by the City Magistrate that the prohibitory orders were withdrawn. The Chief Court also made an order directing the Registrar and the Civil Judge to send the attached property to the City Magistrate for disposal according to law. On the same date Mrs. Paterson was also directed to hand over all the property in her possession which she may be holding as a custodian for Mr. O. V. Forbes to the City Magistrate.

It appears that in August 1943 the City Magistrate forwarded to the U.P. Government at Lucknow promissory notes of the total value of Rs. 2,28,800/- said to be the attached property adding "these G.P. Notes to the total value of Rs. 2,28,800/- have been ordered to be forfeited to the U.P. Government by the Chief Court of Oudh under order dated 21st September 1944 in Criminal Miscellaneous Application No. 47 of 1943". It was further stated that : "It is requested that necessary action may be taken by you to credit the sum under the head Fines and Forfeitures". Apparently this has been done.

Mr. Forbes died in 1953. On April 4, 1960 the present appellant made an application to the U.P. Government in which she stated that Mr. Forbes had died intestate and that his only heirs were his two sisters, the appellant herself and her sister Mrs. E. D. Earle for whom she was the trustee and prayed that as the Government was "only in the position of a receiver or a trustee of the property of Mr. Forbes this trusteeship having ceased with Mr. Forbes death the government should return the property to the appellant and her sister". On September 3, 1960 the Government rejected this prayer stating "that this was a confiscated property of Mr. Forbes and that on legal grounds her claim was Wholly untenable" but added these words : "If however she has any special reasons for invoking the compassion of Government she may indicate the same to Government and also furnish convincing evidence that Mr. Forbes actually has died and that she is his sole heir or one of the heirs entitled to his assets."

The appellant pointed out to the Government in her letter dated September 12, 1960 that the property of Mr. Forbes had not been confiscated but merely attached and emphasised that the Government had no proprietary right to the attached property but could retain it only as a custodian or trustee for the time being. She asked the Government to re-consider the whole situation. The reply of Government, if any was apparently unsatisfactory and so on November 29, 1960 the appellant filed an application under Art. 226 of the Constitution in the High Court at Allahabad in which after stating the several facts as regards the attachment of the property and the action taken by the Government, she prayed for a writ of certiorari to quash the Government's order of September 3, 1960 and also for a writ of Mandamus ordering the Government to hand over the Government promissory notes and cash money which had been attached. On March 29, 1961 the High Court rejected this application. The High Court pointed out that the applicant had not shown that the State Government had failed to carry out any duty imposed by law and further that the order dated September 5, 1960 could not be said to be either a judicial or a quasi-judicial order or even an administrative order passed without jurisdiction. It was then that on May 1, 1961 the appellant made to the High Court at Allahabad the application out of which the present appeal has arisen.

By this application the appellant asked for four reliefs :- (a) for an order terminating the contempt of court proceedings; (b) for an order vacating the orders of attachment made by the Chief Court; (c) for a direction on the Finance Secretary, U.P. Government, to restore the attached property to the applicant as executrix of the estate of late Mrs. A. E. Forbes. A copy of the writ petition dated the 29th November, 1960 in which it had been mentioned that the proceedings under s. 87 and s. 88 of the Code of Criminal Procedure were illegal because the code was inapplicable to proceedings for contempt, was attached to the application. It was further stated in the present application that in any case the attachment was void inasmuch as the property that was attached was at the time of attachment an undistributed part of the estate of late Mrs. A. E. Forbes and so vested in this appellant as executrix.

By separate but concurring judgments Mr. Justice Mulla and Mr. Justice Nigam, who heard this application rejected the applicant's prayer for vacating the order of attachment or for any direction to the Finance Secretary, U.P. Government for restoration of the attached property. Mr. Justice Mulla based his decision mainly on the point that the appellant had herself acted in an unclean way, and she having been responsible for getting warrants under sections 87 and 88 of the Code of Criminal Procedure issued against Mr. Forbes it did not lie in her mouth to say now that the issue of these processes was without jurisdiction and held that as she was instrumental in getting the order now complained of passed, the discretionary powers of the Court should not be exercised in her favour, especially, as she had made the application after a long delay. The learned Judge also expressed the opinion that the judges of the Chief Court acted within their jurisdiction in issuing processes under ss. 87 and 88 of the Code of Criminal Procedure, that this order was just and legal and the State had come into the custody of the property under the due process of law. In the opinion of the learned Judge "Mr. Forbes was willing to give away this property rather than face a prosecution for contempt of Court" and added "if he took up that attitude it cannot be said by the heirs of Mr. Forbes that now the property should be released in their favour".

Mr. Justice Nigam stressed the point that the Court had attached the property belonging to Mr. Forbes and the present appellant had handed over the property "treating it to be the property of Mr. O. V. Forbes." According to this learned Judge if the property that was attached did not belong to Mr. O. V. Forbes this appellant should have "never handed over the property voluntarily". He was further of opinion that "the fact that she voluntarily handed a property over as belonging to Mr. Forbes and actually suggested that this particular property be attached clearly amounted to.....

an admission of the ownership of the property vesting in Mr. O. V. Forbes and the property not being part of the undistributed assets in the possession of Mrs. Paterson as executrix to Mrs. A. E. Forbes." After holding that the Code of Criminal Procedure was not directly applicable to contempt of court proceedings the learned Judge expressed the opinion that "the Bench could adopt its own procedure for enforcing the attendance of the delinquent" and added "if it adopted the procedure prescribed in the Code of Criminal Procedure, I can see no warrant for the contention that the procedure adopted was wrong, improper and beyond the jurisdiction of the Court." Finally, he held that it would be contrary to the interests of justice to review the order "after a lapse of about 18 years." The learned Judge also held that the Court was no longer in possession of the attached property, the same having been handed over to the City Magistrate for being passed on to the State Government and could not therefore pass any orders in respect of the property. He also expressed the view that prima facie it appeared to him that the appellant's remedy, if any, was by a civil suit. The contempt proceedings were however directed to be consigned to the record as abated.

The present appeal is directed against the High Court's decision refusing to give the plaintiff the substantial relief asked for in the application, viz., a direction on the Finance Secretary, U.P. Government to restore the attached property to her.

The first question for consideration is whether at the time of attachment the property formed part of the unadministered estate of Mrs. A. E. Forbes. If that was the correct legal position there could not be in law attachment of that property as the property of Mr. Forbes, even if s. 87 and s. 88 could be applied to secure the arrest of a person alleged to have committed contempt. Mr. Justice Mulla has not dealt with this question. Mr. Justice Nigam has however formed the definite conclusion that the property had vested in Mr. O. V. Forbes on the date of attachment and was not part of the undistributed assets of Mrs. A. E. Forbes in the hand of the executrix. In coming to this conclusion the learned Judge appears to have relied on what he described as "the fact that she (Mrs. Paterson) voluntarily handed the property over as belonging to Mr. Forbes and actually suggested that this particular property be attached". It is not clear from the record of this case on what materials the learned Judge thought that Mrs. Paterson actually suggested that this particular property be attached. That she really handed the property over appears to be correct. It appears reasonable to think that she did so in obedience to the order of the Court. The matter was stated thus by her in Para. 8 of the Writ Petition :-

"8. That under the orders of the Hon'ble Chief Court of Avadh the petitioner deposited with the Registrar of that court and finally with the City Magistrate, Lucknow, unadministered assets consisting of Government Promissory Notes and each totalling Rupees 2,41,300/- detailed in the list attached to this petition which the City Magistrate, Sri S. G. Bose-Mullick was pleased to transfer the same to the Finance Secretary to the U.P. Government, Lucknow, in August, 1948."

In the counter-affidavit filed on behalf of the State of U.P. in the writ petition the statements made in this paragraph was admitted to be true. It appears clear therefore that the petitioner made over the securities and cash - the property which was attached - under the orders of the Chief Court of Oudh. It is further to be borne in mind that the petitioner made the definite statement in this Para. 8 of the writ Petition that the property that was made over by her formed part of the unadministered assets in her hand and the truth of this statement was admitted by the State of U.P. It is difficulty to see how it can be reasonably held that merely because the executrix handed over certain assets in her hand to the Registrar and the City Magistrate in obedience to the orders of the Chief Court thereby become vested in Mr. O. V. Forbes. The property in the hands of the executrix could become vested in Mr.

O. V. Forbes only on her handing over the same to him or to somebody on his behalf. Delivering the property to the Registrar of the Court or to the City Magistrate could not amount to handing over to the legatee. For, obviously the Registrar of the Chief Court or the City Magistrate, Lucknow, were not acting on behalf of the legatee Mr. O. V. Forbes but indeed acting against his interests. In our opinion, the property did not cease to be unadministered asset of the estates of Mrs. A. E. Forbes merely because under the orders of the Court this appellant, who was the executrix, had the assets in her hand deposited with the Registrar or the City Magistrate.

It must therefore be held that the property which was attached was at the time of attachment not the property of Mr. O. V. Forbes but formed part of the unadministered assets of Mrs. A. E. Forbes. This property could not be legally attached in any proceedings for securing the arrest of Mr. O. V. Forbes.

If what was attached did not form part of the property of Mr. O. V. Forbes, the order of attachment was invalid; and there would be no scope for the operation of s. 88(7) of the Code of Criminal Procedure. Assuming that the property was of Mr. O. V. Forbes, the question arises whether it would, as a result of the attachment, be at the disposal of Government under s. 88(7) of the Code of Criminal Procedure. In *Sukhdev Singh Sodhi v. The Chief Justice and Judges of the Pepsu High Court* [[1954] S. C. R. 454.] it was held that the Code of Criminal Procedure does not apply to proceedings for contempt. On this authority it must be held that the provisions of ss. 87 and 88 would also not be available to securing the presence of a person who is alleged to have committed contempt.

It may be mentioned that on behalf of the appellant, Mr. Chari had urged that even if the property was of Mr. O. V. Forbes, the alleged contemner, the Chief Court of Oudh had no power to attach it.

The High Court seems to think that the Chief Court could choose any procedure it liked in the matter of punishing people for contempt and so if it thought that it would not finally dispose of contempt proceedings without the alleged contemner being present before it, it had the inherent right of first issuing a warrant of arrest and next, if that was not successful, by proclamation for his appearance and also by attachment of his property. It seems to us that the Chief Court as a Court of record had the right to punish persons for contempt and for the proper exercise of that power it will have all other powers necessary and incidental to it.

It is however unnecessary to decide whether such necessary and incidental powers include the power of arrest and of attaching the alleged contemner's property in an attempt to secure his presence. But assuming they do, we are of opinion that the Chief Court had still no right to make over the attached property to Government. The right of the Government to have any control over the attached property flows from the provisions of s. 88 of the Criminal Procedure Code. As no attachment could legally be made under s. 88, Criminal Procedure Code, in any proceeding for contempt, the provisions of s. 88(7) of the Code of Criminal Procedure, under which the property under attachment shall be at the disposal of the State Government, if the proclaimed person does not appear within the time prescribed in the proclamation cannot come into operation.

The position therefore is that Government is in possession of the property that was attached under the orders of the Chief Court; but the possession is without any authority of law. The question then arises : whether the Court can or should direct restoration of the property to the rightful owner.

On behalf of the State of U.P. it is argued that if the Government is in unlawful possession of the

property the proper remedy for the rightful owner is to seek his remedy in a civil suit. In such a suit he will have to pay the necessary court-fee, and it will be open to Government to take the plea of limitation or such other defences as may be available to it. This would ordinarily be a correct statement of the position in law. In the present case, we have however the special circumstance that it is by reason of an error on the part of the Chief Court that the property has found its way to the State Government. Proceedings taken by the Chief court against Mr. O. V. Forbes for alleged contempt of the Court must be taken to be fully justified, as such action is necessary not only to uphold the dignity of the Court but also to keep the administration of justice free from calumny. When however we find that the Court acted without jurisdiction in attaching the property, and in any case, in ordering such property to be handed over to Government we have to remember the other great principle which was stated many years ago in these words by Cairns, L. C. in *Rodger v. Comptoir D' Escompte Da Paris* [[1871] L.R. 3 P.C. 465, 475.] : "One of the first and highest duties of all courts is to take care that the act of the Court does no injury to any of the suitors.....". To say that we are aware, is not to say that whenever a court after wrongly deciding a case between two parties discovers that the decision was wrong it has the inherent jurisdiction to re-open the matter and to set matters right by altering the decision. In many cases when the Court has made a mistake the party who has suffered for that mistake is without any remedy except what he can get in accordance with the provisions of appeal, revision or review. As the courts are careful to point out again and again, courts of law have the jurisdiction to decide wrongly as well as rightly and the mere fact that the decision is wrong does not give a party a remedy. Those considerations against the use of inherent jurisdiction to correct errors made by the courts in the exercise of its jurisdiction have, however, no application to cases like the present. Here, the Court for the purpose of exercising its jurisdiction in a matter of contempt took steps to attach certain properties. This is not a case where there are conflicting claims between two parties which have been decided by a judgment or order of the Court as between the parties. The question really is whether the rightful owner of the property would have it or the Government which has come into possession of the property without being a claimant to it because of an erroneous order of the court should retain it, if it is found that the order was wrong. In our opinion, this question must be answered in favour of the rightful owner of the property.

We have assumed that the Court had the power to attach the properties of the alleged contemner; but have held that it had no power in law to make these over to the Government. The attachment however could only subsist so long as the contemner was alive. On the contemner's death the attachment could not in law or equity continue. For, the purpose for which the attachment was made, viz., to secure the presence of the alleged contemner could not longer be achieved. Obviously, in such a case, the rightful owner of the property would be entitled too restoration of the property on the contemner's death. It would not be proper for the Court to say then that it cannot do anything in the matter because the property has passed into the hands of the Government by the Court's own mistakes. In our opinion, the court will be failing to perform its primary function of doing justice if in such circumstances the court, on discovering its mistake refuses to correct that mistake. As it is plain here that it is the mistaken act of the Court which has put Government in possession of the property even though without being a claimant to it, it is only right and proper that the Court should correct that error and restore the property to the person from whom it was wrongly taken.

We cannot see what legitimate grievance the State of U.P. can have against this. It had no title to the attached property and it would have had no control over it, except for the mistaken application of the provisions of s. 88(7) of the Code of Criminal Procedure. If now it is found that the Court had made a mistake, first, in attaching the property in question, and secondly, even apart from that, in

directing the property to be made over to Government, the Government cannot legitimately object to the Court correcting this mistake. It would be deplorable if in circumstances like these the Court would fine itself helpless to correct its mistake and to order restoration on an application being made to it in that behalf. In our opinion, the applicant is entitled to an order for restoration of the attached property.

We accordingly allow the appeal, and order that the Finance Secretary, U.P. Government be directed to restore to this appellant the attached property which is in the possession of the Government. In the peculiar circumstances of the case, we make no order as to costs.

Appeal allowed.

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