Smt. Laxmi Devi

Vs

Sethani Mukand Kanwar & Two Others

Civil Appeal No. 247 of 1962

(CJI P. B. Gajendragadkar, K. N. Wanchoo, M. Hidayatullah, J. R. Kudholkr JJ)

09.10.1964

JUDGMENT

GAJENDRAGADKAR C.J.

This appeal arises out of an application made by respondent No. 1, Smt. Mukand Kanwar, challenging the validity of an auction sale held on the 14th May, 1954 in execution of a money decree passed in favour of Ratan Lal Dani, Secretary, Hindu Charitable Aushdhalaya, Ajmer, respondent No. 2, and against Umrao Mal, respondent No. 3. The property sold at the auction sale is "old Daikhana" at Ajmer. On the 24th June, 1950, Umrao Mal who was the owner of the property, mortgaged it to the appellant Laxmi Devi. Later, respondent No. 2 obtained a money decree against respondent No. 3 for a large amount, and in execution of this money decree he brought the property in question to sale. Auction sale was accordingly held on the 14th May, 1954, and the appellant purchased the property subject to the pre-existing mortgage in her favour. The amount due under the mortgage was Rs. 33,264 and as auction-purchaser, the appellant paid Rs. 2,800 whereby she purchased the equity of redemption vesting in respondent No. 3, the judgment-debtor. It is the validity of this sale that is challenged in the present proceeding.

Long before the mortgage was executed, respondent No. 3 had executed in favour of his mother, respondent No. 1, a document whereby her maintenance was guaranteed. This document had created charge over certain properties belonging to respondent No. 3. On the strength of this document, respondent No. 1 sued respondent No. 3 (civil suit No. 233 of 1952). In this suit, she claimed arrears of maintenance and asked for a declaration that the properties specified in the plaint, which were the same as the properties covered by the previous agreement between the parties, were subject to a charge for her maintenance. The trial Court gave her a decree for arrears of maintenance, but declined to make the declaration as to charge claimed by her. This decree was pronounced on the 31st July, 1952. Against this decree, respondent No. 1 preferred an appeal (No. 80 of 1952) to the Judicial Commissioner, Ajmer. Her appeal succeeded and the charge over the properties was declared in her favour. This decision was pronounced on the 10th February, 1954.

After the auction sale was held on the 14th May, 1954, it was challenged by two separate applications, one was made by respondent No. 3, the judgment-debtor, on the 28th June, 1954, and the other by respondent No. 1 on the same date. Both these applications were made under O. 21 r. 90 of the Code of Civil Procedure. The application made by respondent No. 3 was dismissed on the 30th April, 1955, while the application made by respondent No. 1 went to a trial. The Executing Court which heard this application tried three issues. The first issue was whether the sale had been vitiated by any irregularity as required by O. 21 r. 90. The second was whether respondent No. 1 was a person whose interests had been affected by the impugned sale; and the third was whether the

irregularity alleged by respondent No. 1 had caused substantial loss to her. All these issues were decided in favour of respondent No. 1. In the result, the impugned sale was set aside on the 4th May, 1955.

The appellant challenged the correctness of this decision before the Judicial Commissioner, Ajmer. It was urged on behalf of the appellant that the application made by respondent No. 1 did not satisfy the requirements of O. 21 r. 90 of the Code inasmuch as appropriate allegations had not been made in the application showing that substantial injury had been suffered by respondent No. 1 by reason of the irregularities which, according to her, had vitiated the said sale. This plea was rejected by the Judicial Commissioner. It was then urged that respondent No. 1 was not competent to make the said application. The Judicial Commissioner did not accept even this plea. The last argument which was pressed before the Judicial Commissioner was that the finding recorded by the Executing Court that respondent No. 1 had suffered substantial injury was not justified, and that in fact, the appellant had no opportunity to lead her evidence on that issue, because all the three issues on which the Executing Court had made its findings had been framed by it at a very late stage of the proceedings. This plea was upheld by the Judicial Commissioner, and so, he set aside the finding of the Executing Court on that issue and sent the case back for disposal in accordance with law, with a direction that the issue as to substantial injury should be tried afresh. This order was pronounced on the 26th August, 1955.

After remand, the Executing Court considered the issue as to substantial injury and held that respondent No. 1 had failed to show any substantial injury. As a result of this finding, it ordered that her application under O. 21 r. 90 should be dismissed, and the sale should be confirmed. This order was pronounced on the 27th April, 1957.

Aggrieved by this order, respondent No. 1 preferred an appeal, and since the High Court of Judicature at Rajasthan had then come into existence, her appeal was heard by the said High Court. The High Court has held that the Executing Court was in error in coming to the conclusion that respondent No. 1 had not proved substantial injury. The contentions raised by the appellant in support of the ultimate decision reached by the Executing Court were rejected by the High Court, and as a result, the application made by respondent No. 1 was allowed and the impugned sale set aside. This appellate order was pronounced on the 29th July, 1960. It is against this order that the appellant has come to this Court with a certificate granted by the said High Court. Thus, it will be noticed that the sale which took place on the 14th May, 1954 still remains to be confirmed.

On behalf of the appellant, Mr. Bhasin Narain has conceded that as a person holding a charge over the property sold at the auction sale, respondent No. 1 can rely on s. 100 of the Transfer of Property Act and as such was competent to make the application under O. 21 r. 90. Order 21, r. 90(1) provides, inter alia. That where any immovable property has been sold in execution of a decree, any person whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it. There is a proviso to this rule which is relevant for our purpose. This proviso lays down that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. While conceding that respondent No. 1 was entitled to make an application as a person whose interests were affected by the impugned sale, Mr. Bishan Narain argues that if the application made by her is properly construed, it would appear that the material allegations of fact which must be made by the applicant invoking O. 21 r. 90(1), have not been made; and so, the said application should be dismissed on that ground alone. On the merits, he contends that there is no evidence on which a finding can be

made in favour of respondent No. 1 that she has suffered substantial injury by reason of any irregularity committed in the conduct of the sale.

The application made by respondent No. 1 is no doubt somewhat defective, because it does not, in terms, allege that as a result of the irregularity alleged in the application, respondent No. 1 has suffered substantial injury. The application avers that before the impugned auction sale was held, a proclamation had been issued, but the said proclamation did not refer to the charge in favour of respondent No. 1 which had already been recognised by decree in a suit between respondent No. 1 and respondent No. 3 and that naturally attracts the provisions of O. 21 r. 66 of the Code. Order 21 r. 66(2)(e) requires that the proclamation shall be drawn up and shall specify as fairly and accurately as possible any incumbrance to which the property sought to be sold is liable. The failure to mention the charge in favour of respondent No. 1 would, therefore, constitute an irregularity within the meaning of O. 21 r. 90(1). This position is also not in dispute.

The contention, however, is that the application made by respondent No. 1 does not show what injury she has suffered as a result of the said irregularity, and that, it is argued, constitutes a serious infirmity in the application which would entail its dismissal. On the other hand, Mr. Sharma for respondent No. 1 has relied on the fact that the auction sale would virtually wipe out or extinguish the rights which have accrued to respondent No. 1 by virtue of the charge declared by a decree in her favour, and he has suggested that the legal consequence flowing from the fact that the auction sale has been held without notice of the charge in favour of respondent No. 1 itself constitutes substantial injury to the interests of respondent No. 1. This argument is based on the latter part of s. 100 of the Transfer of Property Act. We will presently refer to this provision. At this stage, it is enough to state that if Mr. Sharma is right in contending that an auction sale of immovable property which has followed the proclamation issued under O. 21 r. 66 in which no reference to a charge is made, materially affects the rights of the charge-holder, some injury would automatically flow from the irregularity alleged in the application filed by respondent No. 1, and so, it would not be appropriate to hold that the said application should be dismissed on the ground that no substantial injury has been alleged as required by the proviso to O. 21 r. 90(1).

It is true that before an application made under O. 21 r. 90 can succeed, the applicant has to show that the impugned sale was vitiated by a material irregularity or fraud in publishing or conducting it; and as required by the proviso, it is also necessary that he should show that in consequence of the said irregularity or fraud he had sustained substantial injury. Therefore, Mr. Bishan Narain is right when he contends that the application made by respondent No. 1 ought to contain an allegation in regard to the material irregularity as well as an allegation as to substantial injury. But, in our opinion, in a case like the present, where substantial injury is alleged to be implicit in the material irregularity set out in the application, it would be too technical to hold that the application should be dismissed on the preliminary ground that no specific or express averment has been made as to substantial injury suffered by respondent No. 1.

Now, in dealing with the question as to whether respondent No. 1 can be said to have alleged that she has suffered substantial injury by reason of the fact that she has alleged a material irregularity which, in law, necessarily leads to substantial injury, it is necessary to consider the question as to whether the latter part of s. 100 of the Transfer of Property Act applies to the present case. Section 100 deals with charges, and it provides when a person can be said to have a charge on the property; and adds that all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge. It is common ground that respondent No. 1 can claim to be charge-holder as defined by s. 100.

That takes us to the latter part of s. 100. This part provides, inter alia, that save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge. Mr. Sharma contends that the auction-purchaser holds the property as a result of the auction sale, and in that sense, the property must be held to have been transferred to him. He adds that the charge was notified in the proclamation, and so, the auction-purchaser has no notice of the charge, and the sale is undoubtedly supported by consideration. In other words, the case of the appellant directly falls under this part of s. 100, and so, respondent No. 1 would not be able to enforce her charge against the property purchased by the appellant at the auction sale. That, according to him, constitutes substantial injury.

This argument raises the question as to whether the relevant provision of s. 100 takes in the cases of auction purchase at all. For answering this question, it is necessary to refer to two other provisions of the Transfer of Property Act. Section 2(d) provides that nothing herein contained shall be deemed to affect, save as provided by s. 57 and Chapter IV of this Act, any transfer by operation of law or by or in execution of, a decree or order of a Court of competent jurisdiction. The effect of this provision is that the provisions of the Transfer of Property Act will not apply to any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction. This provision is clear and emphatic. It says that nothing in the Transfer of Property Act will apply to the transfers just indicated; and that would naturally take in the whole of s. 100. But there is an exception made to this provision by s. 2(d) itself by the saving clause, and this exception covers cases provided by s. 57 and Chapter IV. Chapter IV deals with mortgages of immovable property and charges, and includes sections 58 to 104. Section 100, therefore, falls within Chapter IV; and the result of the saving clause is that s. 100 would apply to transfers by operation of law. There is, therefore, no doubt that if the question as to the applicability of the latter part of s. 100 to cases of auction sales had to be determined only by reference to s. 2(d), the answer would clearly be in favour of such applicability.

It is true that when s. 2(d) was originally enacted, the latter part of s. 100 was not included in the Transfer of Property Act; this was added in 1929 by s. 50 of Act 20 of 1929. That, however, would make no difference to the interpretation of the relevant clause in s. 2(d). The fact that the saving clause included in s. 2(d) as it was originally enacted, could not have taken in the latter part of s. 100, makes no difference to its construction, because as soon as the latter provision was added to s. 100, it became a part of the provisions contained in Chapter IV and automatically fell within the terms of the saving clause. If the legislature had intended that the provision added to s. 100 in 1929 should not fall within the saving clause, an appropriate provision would have been made by amending s. 2(d) in that behalf. Therefore, s. 2(d) by itself clearly supports Mr. Sharma's contention that the appellant who is an auction-purchaser would be able to claim immunity against the enforcement of the charge in favour of respondent No. 1 by virtue of the provisions contained in the latter part of s. 100.

This position, however, has become somewhat complicated by reason of the provisions contained in s. 5 of the Transfer of Property Act. Section 5 provides, inter alia, that in the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons. In other words, in terms, the definition of the expression "transfer of property" as used in all the sections of the Transfer of Property Act is intended to take in transfers effected by acts of parties inter vivos, and an auction-sale clearly is not such an act. Section 5 would, therefore, appear to exclude auction sales from the purview of s. 100 altogether. This result would appear to be consistent with the provision in the preamble of the Act which says that the

Transfer of Property Act was enacted because it was thought expedient to define and amend certain parts of the law relating to the transfer of property by act of parties. That is the position which emerges from the reading of s. 5 coupled with the preamble; and that naturally raises the question as to how to reconcile these two inconsistent positions.

In our opinion, the positive provision contained in s. 2(d) must prevail over the definition of "transfer of property" prescribed by s. 5 No doubt, the purpose of the definition is to indicate the class of transfers to which the provisions of the Transfer of Property Act are intended to be applied; but a definition of this kind cannot over-ride the clear and positive direction contained in the specific words used by s. 2(d). As we have already seen, the result of the saving clause enacted by s. 2(d) is to emphasise the fact that the provisions of s. 57 and those contained in Chapter IV must apply to transfer by operation of law. Such a positive provision cannot be made to yield to what may appear to be the effect of the definition prescribed by s. 5, and so, we are inclined to hold that notwithstanding the definition prescribed by s. 5, the latter part of s. 100 must be deemed to include auction sales.

This question has been considered by our High Courts on several occasions, and, on the whole, the majority view appears to be in favour of the conclusion which we have just indicated. In Nawal Kishore v. the Municipal Board, Agra, (I.L.R. [1943] All. 453) this question was referred to a Full Bench of the Allahabad High Court, because there appeared to be a conflict between two previous decisions of Division Benches of the said High Court on this point. These two decisions were Raj Indra Narain v. Muhammed Ismail (I.L.R. [1939] All. 885), and Municipal Board, Kanpore v. Roop Chand Jain (I.L. R. [1940] All. 669). In the first decision, the Allahabad High Court had taken the view that auction sales do not fall within the purview of the latter part of s. 100, while in the latter case, a contrary view had been accepted. The Full Bench preferred that latter view to the former. Since this Full Bench decision was pronounced in the Allahabad High Court, auction-purchasers have been consistently held to fall under the latter part of s. 100. It has been held by the Full Bench that when the relevant clause in the latter part of s. 100 speaks of any property in the hands of person to whom such property has been transferred, the concept of transfer is wide enough to include transfers effected by acts of parties as well as transfers effected by operation of law. The same view has been accepted by the Patna High Court in R. L. Nanadkeolvar v. Sultan Jehan (I.L.R. (1952) 31 Pat. 722), and by the Punjab High Court in Manna Singh Allah Singh v. Wasti Ram Saraf and Others (A.I.R. 1960. Punj. 296). The decision of the Madras High Court in Arumilli Surayya v. Pinisetti Venkataramanamma and Ors. (A.I.R. 1940 Mad. 701) and the decision of the Calcutta High Court in Creet v. Ganga Ram Gool Raj, (I.L.R. [1937] 1 Cal. 203) which appear to support the contrary view do not, in our opinion, correctly represent the true legal position in this matter. Therefore, we must deal with the present appeal on the basis that as a result of the failure of the proclamation to refer to the charge in favour of respondent No. 1, she would not be able to enforce her charge against the property purchased by the appellant by auction sale; and that means that the impugned sale has been conducted in a materially irregular manner and as a consequence of the said irregularity, some injury has resulted to respondent No. 1.

That raises the question as to whether the said injury can be said to amount to substantial injury within the meaning of proviso to O. 21 r. 90(1); and this inevitably would be a question of fact. The High Court appears to have held that as soon as it is shown that the charge would become unenforceable against the appellant auction-purchaser by virtue of the provisions of s. 100, it follows as a matter of law that respondent No. 1 has suffered substantial injury, and so, the impugned sale must be set aside. We are not prepared to accept this view. We do not think it can be reason ably assumed as a matter of law that in every case where a charge has become unenforceable

against an auction-purchaser by reason of the fact that it was not shown in the proclamation preceding the auction sale, it follows that the charge-holder has suffered substantial injury. Whether or not the injury suffered by the charge-holder is substantial, must depend upon several relevant facts. How many properties have been sold at the auction sale; how many out of them were the subject-matter of the charge; what is the extent of the claim which the charge-holder can legitimately expect to enforce against the properties charged, these and other relevant matters must be considered before deciding whether or not the injury suffered by the charge-holder is substantial. It is from this point of view that the material facts in the present case must now be considered.

Properties which are the subject-matter of the charge are five in number. Out of these properties, it is property No. 3 alone which has sold at auction sale. It appears that properties Nos. 1 and 2 have already ceased to be available to the chargeholder, and so, the consideration of the question as to whether the injury suffered by respondent No. 1 is substantial, must depend upon the relative values of properties Nos. 4 and 6. This question has been considered by the Executing Court when the matter was sent back that Court by the Judicial Commissioner and the Executing Court has made a definite finding that the injury suffered by respondent No. 1 cannot be said to be substantial. According to it, properties Nos. 4 and 6 which would be available to respondent No. 1 would be enough to meet all her legitimate claims against the judgment-debtor, respondent No. 3. The value of Property No. 4 is Rs. 1,18,967 whereas the value of property No. 6 is Rs. 1,25,464. The Executing Court has taken into account the amount which respondent No. 1 is entitled to claim by way of maintenance from respondent No. 3, has also borne in mind the fact that respondent No. 1 is an old lady past 70 years of age, and has come to the conclusion that, on the whole, the sale of property No. 3 to the auction-purchaser cannot be said to have caused substantial injury to her. In our opinion, it is difficult to differ from this conclusion; and so, if follows that though respondent No. 1 has been able to show that her charge could not be enforced against the appellant, it is not shown that this circumstance has caused substantial injury to her. The result, therefore, is that the requirement of the proviso to O. 21 r. 90 of the Code is not satisfied in the present case.

We ought to add that pending the appeal before this Court, respondent No. 3, Umrao Mal has died leaving behind him his mother respondent No. 1 and his widow, and the estate of Umrao Mal has devolved on these two widows; and so, respondent No. 1 has now become the owner of part of the properties against which she would otherwise have been entitled to proceed in execution of her maintenance decree.

The result is, the appeal is allowed, the order passed by the High Court is set aside and the application made by respondent No. 1 under O. 21 r. 90 is dismissed. There would be no order as to costs throughout.

Appeal allowed.

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