

Ramchandra Spg. & Wvg. Mills

Vs

Bijli Cotton Mills and Ors.

Civil Appeal No. 877 of 1964

(K. N. Wanchoo, R. S. Bachawat, J. M. Shelat JJ)

16.12.1966

JUDGMENT

SHELAT, J. –

This appeal by special leave raises the question whether an order by an executing Court setting aside an auction sale as a nullity is an appealable order.

In pursuance of a decree passed against the appellant (judgment debtor) the judgment creditor took out execution proceeding. An auction sale of the factory belonging to the appellant was ordered by the executing court. In pursuance of that order the Amin (the auction officer) held an auction sale on September 10, 1962. Respondent No. 1 was held to be the highest bidder for Rs. 2,45,000/-. The appellant challenged the auction sale alleging that the Amin had not realised 1/4th of the sale proceeds immediately after the said auction was closed as required by O. 21 R. 84 of the Code of Civil Procedure. His case was that the Amin realised the said amount and deposited it in the Treasury on September 11, 1962. The appellant thereafter filed an application under O. 21 R. 84 before the Civil Judge. Aligarh. Respondent No. 1 contested that application stating that he had tendered the said amount immediately after the auction, that the said amount being large the Amin hesitated to accept it in cash as it was too late that day to deposit it in the Treasury. He also alleged that the Amin wanted to know whether he could accept a cheque instead of cash and therefore took Chhotelal, his representative, along with him to the residence of the Munsif, Hathras, to take directions. Leaving Chhotelal in the car outside the Munsif's residence, the Amin went in to consult the Munsif if he could accept a cheque but the Munsif advised him to take cash. Thereafter the Amin returned to the car where he accepted the said amount from Chhotelal and issued there and then a receipt therefor. The respondent's case therefore was that he offered the amount immediately, that is was no fault of his that the Amin did not then accept it, and that it was paid in any event soon after the auction and therefore payment was in consonance with O. 21 R. 84.

The Civil Judge refused to accept the case of respondent No. 1 and setting aside the auction sale held it to be a nullity. He rejected the report of the Amin that he had accepted the money immediately after seeing the Munsif outside the Munsif's house where Chhotelal was in the car. The Civil Judge thought that the Munsif's evidence did not support the Amin as the Munsif had stated that it was only the Amin who had come to see him. Therefore the evidence of the Amin and Chhotelal that the amount of Rs. 61,250/- was paid in the car outside the Munsif's house was not free from doubt. What impressed the Civil Judge was the fact that in his report dated September 10, 1962 the Amin had not mentioned the fact of his having received the said amount and the receipt issued by him that day. There was however an endorsement at the foot of that report made on September 11, 1962 in which the Amin had mentioned the fact of his having received the said

amount and the receipt having been issued by him on September 10, 1962. The Civil Judge, however, felt that if he had received that amount on September 10, 1962, the Amin was bound to have mentioned that fact in the body of that report that very day, that is, on the 10th and that therefore the endorsement was written out as an afterthought to support Chhotelal's evidence. Apart from the evidence of the Amin, the Munsif and Chhotelal, there was also the evidence that respondent No. 1 had that day withdrawn Rs. 1,51,000 from the Bank and had available with him cash and there was no reason why he should not have paid Rs. 61,250 from that amount that very day.

Respondent No. 1 filed an appeal against the said order in the High Court. The High Court accepted the Amin's report and his evidence and reversed the judgment and order of the Civil Judge holding that there was no breach of O. 21 R. 84 and that the sale therefore could not be set aside as a nullity. The High Court held - and rightly, that there was no contradiction between the Munsif's evidence and that of the Amin. For, if Chhotelal was waiting in the car outside the Munsif's house the Munsif was not likely to see him and would naturally depose that the Amin alone had come to his house for consulting him. The High Court also rightly held that there was no valid reason to doubt that Amin's report, the said receipt and the evidence that sufficient cash was available with respondent No. 1 from which he had no reason not to pay the amount of Rs. 61,250 immediately after the auction and that though some time elapsed after the auction as the Amin went to consult the Munsif the said amount was paid in accordance with O. 21 Rs. 84.

Counsel for the appellant tried to challenge this finding of fact by the High Court but as the evidence on this question was clear and the High Court's finding was fully justified we, in our discretion under Article 136 declined to permit him to go into the evidence with a view to reopen the said finding.

The only question which the appellant's Counsel then raised was that the order of the Civil Judge was made under O. 21 R. 84, and that order was not a final but an interlocutory order. It did not conclude the execution proceedings but only ordered a fresh auction sale therefore no appeal lay before the High Court. He also contended that the sale being contrary to O. 21 R. 84, it was a nullity and therefore O. 21 R. 90 did not apply. Hence there could be no appeal against the said order. These very contentions were raised before the High Court but they were rejected on the ground that the appellant's application could not be under O. 21 R. 84 and that therefore the application was under R. 90 or that order, that is, that it was an objection to a material irregularity in the conduct and publication of the said sale. The High Court also held that such an objection related to execution of the decree and therefore would fall under section 47 of the Code and an appeal lay against such an order.

In *Manilal Mohanlal Shah & Ors. v. Sardar Sayed Ahmed Sayed Mohammed & Anr.* ([1955] 1 S.C.R. 108) this Court has held that Rules 84 and 85 of Order XXI being mandatory if they are not complied with there would be no sale at all and the court is bound to order a resale. That decision also held that since there would be no sale and the imported sale is nullity there would be no question of a material irregularity in the conduct of the sale and R. 90 would therefore not apply. An application under R. 90 as held by the High Court therefore would not lie.

The question then is whether section 47 of the Code would apply. It has been consistently held in a number of decisions by the Privy Council and the High Courts that Section 47 is wide and should be liberally construed so as not to drive the parties to a separate suit and thereby prolong litigation. All questions relating to the execution, discharge or satisfaction of the decree which arise between the

parties fall within the scope of this section. The Explanation added to the section in 1956 includes a purchaser at a sale in execution of the decree as a party to the suit. Consistently with the decisions giving a liberal interpretation to this section it has been held that an order setting aside an auction sale for non-payment of deposit as provided by R. 85 of O. 21 falls under section 47 irrespective of whether the purchaser is a decree-holder or a stranger. (See *Nandlal v. Siddiquan*). (A.I.R. 1957 All. 558) The High Court of Madras has also held that where an auction purchaser has deposited the balance amount under R. 85 but has failed to lodge a receipt therefor and the court orders re-sale, an application for review of such an order falls under section 47 and such an order is appealable. (*Veerayya v. Tirichirapalli District Board*) (A.I.R. 1961 Mad, 409). Various High Courts have similarly held that when a sale in execution of a decree whose validity is not questioned is attacked on the ground that it is not merely irregular but illegal and void that must be done by a proceeding under section 47 and not by an independent suit. [See cases collected in *Mulla's C.P.C.* 13th ed. Vol. 1 p. 236, footnote (i)]. If the order setting aside the sale on the ground that the deposit as provided for under R. 85 was not made falls within the scope of section 47 there does not appear to be any reason why an order holding the sale to be a nullity on the ground that R. 84 was not complied with cannot also fall under that section.

Under section 2(2) of the Code a decree is deemed to include the determination of any question falling within section 47. An execution proceeding no doubt is not a suit but the combined effect of section 2(2) and section 47 is that an order passed in execution proceeding is tantamount to a decree in so far as regards the court passing it is conclusively determines the question arising between the parties to the suit (which expression now includes an auction purchaser) and relating to the execution of the decree. Therefore if an order decides a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree it would fall under section 47 and would be a decree within the meaning of section 2(2). If such an order is a decree it is appealable under section 96 of the Code.

Reliance was placed on the judgment of the High Court of Bombay in *Manilal Mohanlal Shah v. Sardar Sayed Ahmed Sayed Mohamed* (57 Bombay Law Reporter 10), (from which the appeal came up before this Court), ([1955] 1 S.C.R. 108) where the High Court took the view that since it is the duty of an executing court to order re-sale where conditions of R. 84 are not complied with even though the Rule does not expressly provide for an application, if the Court sets aside the sale upon an application made to it, it can be said to have acted suo moto and the order therefore would be under R. 84. It is however not necessary for us to decide whether it is so or not, for, the only question before us is whether such an order amounts to a decree and is therefore appealable. Counsel for the appellant then relied upon *Mrs. Peliti v. Kanshi Gopal* (A.I.R. 1939 Lah. 210) where it was held that such an order was not appealable on the ground (1) that an auction purchaser even if he is not a stranger is not a party to the suit and (2) that such an order setting aside an auction sale would not be one relating to the execution, discharge or satisfaction of the decree and therefore not an order under section 47. The first ground no longer survives in view of the Explanation added to section 47. It therefore remains to be seen whether the second ground is a valid ground. In *Bharat National Bank v. Bhagwan Singh* (A.I.R. 1943 Lah. 210) the judgment-debtor raised three contentions : (1) with regard to his objection to the proclamation of sale, (2) the jurisdiction of the executing court and (3) limitation. The Division Bench which heard them upheld the first contention holding that his objection to the proclamation was valid and therefore ordered a fresh sale but rejected his other two objections. In an application for leave to appeal to the Privy Council heard by a Full Bench of that High Court, the judgment-debtor contended that he was entitled to leave on the ground that though the first part of the order did not finally determine the rights of the parties the High Court's decision on the rest of his other two contentions amounted to a decree. The Full Bench

by a majority decision disallowed the application on the ground that there was no final determination of the execution proceedings as the High Court had ordered a resale and even if the order in regard to the contentions as to jurisdiction and limitation were to be considered to be a final determination the judgment of the High Court could not be divided into parts. The question whether ordering a fresh sale would be a final determination if raised by an auction purchaser was not before the High Court. As regards the judgment-debtor the order obviously was not a final determination as the execution proceedings were not finally concluded. The decision in *Md. Zakaria v. Kishun* (A.I.R. 1926 All 268) relied on by Counsel for the appellant laid down two propositions : (1) that an order under R. 66 of O. 21 was not an appealable order and (2) that the only orders which are appealable are those which determine the rights of the parties to the execution.

There can be no objection to these propositions. But this decision has no bearing on the contention raised before us and can therefore be of no assistance. *Mohit Narain Jha v. Thakan Jha* (I.L.R. 4 Pat. 731), is again a case of an order passed under O. 21 R. 66 refusing to notify a certain lease in the proclamation of sale. There being no determination of the rights of the parties and the order at best being a processual one the High Court was right in holding that such an order was neither a decree nor appealable. The decision in *Radhe Lal v. Ladli Persad* (A.I.R. 1957 Punjab 92) which the Counsel referred to does not also assist him but lays down on the contrary that where a plea which is overruled is the subject of a separate petition under section 47 and it is a self contained plea with no reference to the other matters in dispute the order over ruling such a plea is final as regards that particular objection raised by the judgment-debtor and is appealable. In *Pankaj Kumar v. Nanibala* (A.I.R. 1963, Cal. 524) the High Court was concerned with the question whether the order in question was a final order under Art. 133 of the Constitution. The order against which an appeal to this Court was sought for was one dismissing certain objections raised by the judgment-debtor. The order did not dispose of the execution proceedings in which it was raised and on that ground the High Court held that no appeal lay before this Court and refused to issue the certificate. Thus, except for the decision in *Mrs. J. Peliti v. Kanshi Gopal* (A.I.R. 1939 Lah. 210) none of the decisions relied on by Counsel relates to the question before us and therefore they are not of any assistance.

As to what is a final order was stated by this Court in *Jethanand & Sons v. State of Uttar Pradesh* (A.I.R. 1961 S.C. 794) in the following terms :

"An order is final if it amounts to a final decision relating to the rights of the parties in dispute in the civil proceeding. If after the order the civil proceeding still remains to be tried and the rights in dispute between the parties had to be determined, the order is not a final order within the meaning of Art. 133."

Similarly in *Abdul Rahman v. D. K. Cassim* (60 I.A. 76) Sir George Lowndes observed :

"The finality must be finality in relation to the suit. If after the order the suit is still alive in which rights of the parties have still to be determined no appeal lies against it. The fact that the order decides an important and even a vital issue is by itself not material. If the decision on an issue puts an end to the suit, the order will undoubtedly be a final one."

In deciding the question whether the order is a final order determining the rights of parties and therefore falling within the definition of a decree in section 2(2), it would often become necessary to view it from the point of view of both the parties in the present case - the judgment debtor and the

auction-purchaser. So far as the judgment-debtor is concerned the order obviously does not finally decide his rights since a fresh sale is ordered. The position, however, of the auction purchaser is different. When an auction-purchaser is declared to be the highest bidder and the auction is declared have been concluded certain rights accrue to him and he becomes entitled to conveyance of the property through the court on his paying the balance unless the sale is not confirmed by the Court. Where an application is made to set aside the auction sale as a nullity, if the court sets it aside either by an order on such an application or suo moto the only question arising in such a case as between him and the judgment debtor is whether the auction was a nullity by reason of any violation of O. 21 R. 84 or other similar mandatory provisions. If the court sets aside the auction sale there is an end of the matter and no further question remains to be decided so far as he and the judgment-debtor are concerned. Even though a resale in such a case is ordered such an order cannot be said to be an interlocutory order as the entire matter is finally disposed of. It is thus manifest that the order setting aside the auction sale amounts to a final decision relating to the rights of the parties in dispute in that particular civil proceedings, such a proceeding being one in which the rights and liabilities of the parties arising from the auction sale are in dispute and wherein they are finally determined by the court passing the order setting it aside. The parties in such a case are only the judgment-debtor and the auction-purchaser, the only issue between them for determination being whether the auction sale is liable to be set aside. There is an end of that matter when the court passes the order and that order is final as it finally determines the rights and liabilities of the parties, viz., the judgment-debtor and the auction-purchaser in regard to that sale, as after that order nothing remains to be determined as between them.

An auction sale is held in pursuance of execution proceedings taken out by the judgment-creditor and the order passed by the executing court. Until the decree is satisfied or discharged the execution proceedings cannot be said to have been completed. It is by the payment of sale proceeds resulting from such sale that the decree is satisfied either in part or in whole. That being clearly the position it is difficult to comprehend as to why as held in *Mrs. J. Peliti v. Kanshi Gopal* (A.I.R. 1939 Lah. 210) an order declaring an auction sale as a nullity cannot be said to be one relating to the execution discharge or satisfaction of the decree within the meaning of section 47.

In our view the order in question was a final order determining the rights of the parties and therefore fell within the definition of a decree under section 2(2) read with section 47 and was therefore an appealable order. The appeal therefore lay before the High Court. The contentions raised on behalf of the appellant therefore must be rejected.

The appeal is dismissed with costs.

Appeal dismissed.

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