

Hindusthan Commercial Bank Ltd.

Vs

Punnu Sahu (dead) through Legal Representatives

Civil Appeal No. 1694 of 1966

(J.C. Shah, K.S. Hegde JJ)

01.12.1969

JUDGMENT

HEGDE, J. -

1. This is an appeal by special leave. It arises from Execution Case No. 16 of 1956 in the Court of the First Additional Civil Judge, Varanasi. Therein certain properties belonging to the judgment-debtor were sold. The appellant moved the executing Court under Order XXI, Rule 90, Code of Civil Procedure to set aside the sale. His application was dismissed on the ground that he was not an interested party. Aggrieved by that order he went up in appeal to the High Court of Allahabad. The High Court reversed the finding of the lower Court that the appellant was not an interested party but at the same time dismissed the appeal on the ground that as the appellant had not complied with the requirements of Rule 90, Order XXI, Code of Civil Procedure, as amended by the Allahabad High Court his application was not maintainable.

2. The amended proviso with which we are concerned in this appeal reads thus :

"Provided that no application to set aside a sale shall be entertained -

(a) upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up; and

(b) unless the applicant deposits such amount not exceeding twelve and half per cent. of the sum realised by the sale or furnishes such security as the Court may, in its discretion, fix except when the Court for reasons to be recorded dispense with the requirements of this clause :

Provided further 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."

3. Clause (b) of the proviso was added on June 1, 1957. The application with which we are concerned in this case was made on January 2, 1957. The applicant did not give security as provided in the newly amended clause nor did the Court call upon him to do so. Before the executing Court all the parties proceeded on the basis that the application was regularly made. The objection as to the maintainability of the application appears to have been taken for the first time in the High Court.

4. Before the High Court it was contended on behalf of the appellant and that contention was

repeated in this Court, that Clause (b) of the proviso did not govern the present proceedings as the application in question had been filed several months before that clause was added to the proviso. It is the contention of the appellant that the expression "entertain" found in the proviso refers to the initiation of the proceedings and not to the stage when the Court takes up the application for consideration. This contention was rejected by the High Court relying on the decision of that Court in *Kandan Lal v. Jagan Nath Sharama*, AIR 1962 All 547. The same view had been taken by the said High Court in *Dhoom Chand Jain v. Chamanlal Gupta*, AIR 1962 All 543 and *Haji Rahim Bux and Sons v. Firm Samiullah and Sons*, AIR 1963 All 320 and again in *Mahavir Singh v. Gauri Shankar*, AIR 1964 All 289. These decisions have interpreted the expression "entertain" as meaning 'adjudicate upon' or 'proceed to consider on merits'. This view of the High Court has been accepted as correct by this Court in *Lakshmiratan Engineering Works Ltd. Asst, Comm. Sales Tax, Kanpur*, AIR 1968 SC 488. We are bound by that decision and as such we are unable to accept the contention of the appellant that Clause (b) of the proviso did not apply to the present proceedings.

5. In the High Court, the appellant prayed for an opportunity for complying with the requirements of Clause (b) of the proviso to Order XXI, Rule 90, Code of Civil Procedure, but the High Court refused to grant him that opportunity as in its opinion, the compliance of the proviso had to be made prior to the disposal of the application on merits. It proceeded on the basis that the compliance of the proviso is mandatory and as such the Court is incompetent to permit the applicant to comply with the same, once the application has been disposed of on merits. In our judgment this view of the High Court is erroneous. Clause (n) of the proviso confers on Court considerable discretion. It is left to the Court to decide the quantum of deposit to be made subject to the maximum prescribed therein. The Court is also conferred with the power to dispense with the requirements of making a deposit, for reasons to be recorded. From the language of the proviso, it is clear that the power conferred on the Court is a discretionary power. As observed by the Allahabad High Court in *Kundan Lal's case*, (supra), it is expected that the Court would ordinarily give an opportunity to the applicant to comply with Clause (b) of the proviso and could reject the application if the same were still not complied with. That should be particularly so in an application made before Clause (b) was incorporated into the proviso. As seen earlier before the executing Court all the parties had proceeded on the basis that the clause in question did not apply to the present proceedings. Under the circumstances, we are of the opinion, that in the interest of justice the High Court should have remanded the case to the executing Court leaving it to that Court to exercise its discretion under Clause (b).

6. For the reasons mentioned above we allow this appeal and set aside the order of the High Court and remit the case to the executing court for dealing with the same in accordance with law. The costs of this appeal shall be costs in the cause.

</html