

Mahadeo Prasad Singh and Another

Vs

Ram Lochan and Others

Civil Appeal No. 1831 of 1973

(R. S. Pathak, R. S. Sarkaria JJ)

16.09.1980

JUDGMENT

SARKARIA, J. –

1. This appeal is directed against a judgment, dated May 4, 1970, of the High Court of Allahabad. It arises in these circumstances :

2. One Matadin, father of Ram Lochan, respondent 1 herein, was a fixed rate tenant of the plots in dispute measuring 2.11 acres. One Ram Naresh Singh (deceased), brother of appellant 1 herein, namely Mahadeo Prasad Singh, obtained a money decree against Matadin on February 18, 1953 from the Judge, Small Causes Court, Varanasi in suit No. 847 of 1953. Ram Naresh Singh sought to execute the decree. As a consequence, the decree was transferred from the Court of the Judge of Small Causes to the Court of Munsif, Varanasi, for execution. The plots in dispute were put to auction by the executing court, and were purchased by the decree holder on July 20, 1956. The sale was confirmed on August 29, 1956 and the sale certificate was issued on September 8, 1956. The decree-holder-purchaser, Ram Naresh Singh, took delivery of possession over these plots on March 14, 1957. Thereafter, he further sold the plots to appellant 2 and respondents 6 to 10.

3. Matadin, however, died sometime in 1960. Thereafter, his son Ram Lochan, respondent 1 herein, instituted a suit on June 14, 1961 i.e., more than three years after the delivery of possession to the decree-holder-purchaser, Ram Naresh Singh, under Section 229-B read with Section 209 of the U.P. Zamindari Abolition and Land Reforms Act in the Revenue Court against the present appellants, for a declaration that he is in possession of the suit land as bhoomidar. In the alternative, he claimed the relief of possession on the same basis. He pleaded that his father, Matadin, was the original bhoomidar and remained in possession of the suit land till his death and thereafter, the plaintiff as the heir of the deceased continued in possession as bhoomidar. He further alleged that the sale in favour of Ram Naresh Singh was without jurisdiction and a nullity; as it had been made without the knowledge of or notice to his father.

4. The suit was resisted by the appellant, who is original defendant 1, and respondents 7 to 10, who are original defendants 2 to 5, inter alia on the ground that the suit was barred as res judicata and also under Section 47 of the Code of Civil Procedure, and Article 181 of the Limitation Act. Defendants 2 to 5 further pleaded that they were bona fide purchasers for value and, therefore, their rights in the suit land were protected under Section 41 of the Transfer of Property Act. They also, alleged that they had made improvements on the suit land and were entitled to the benefit of Section 51 of the Transfer of Property Act.

5. The trial Court, by its judgment, dated August 30, 1965, dismissed the suit, holding, inter alia, that it was barred by the principle of constructive res judicata as also under Section 47 of the Code of Civil Procedure; that the Revenue Court had no jurisdiction of entertain and try the suit; that the appellants 6 to 10 were bona fide purchasers for value and, as such, were entitled to the benefit of Sections 41 and 51 of the Transfer of Property Act; that the suit was barred by Article 181 of the Limitation Act, 1908 as well as by Section 34(5) of the U.P. Land Reforms Act; and that Ram Naresh Singh had been in possession since March 14, 1957, i.e., the date on which he obtained delivery of possession in execution of his decree as auction-purchaser.

6. Aggrieved, the plaintiff (respondent 1) preferred an appeal to the Court of the Additional Commissioner, Varanasi, who by his judgment dated December 28, 1965, allowed the appeal and held that the executing court had not jurisdiction to sell the suit land under Section 42 of the Code of Civil Procedure, as amended by the U.P. Civil Laws (Reforms and Amendment) Act, 1954 and that the suit was not barred as res judicata or under Section 47 of the Code of Civil Procedure. The Additional Commissioner further held that the possession of Ram Naresh Singh was unlawful as it was on the basis of the void sale, dated March 4, 1960, which could not confer any title on him; that the judgment-debtor had no knowledge about the execution proceedings; that the suit property worth Rs. 6,000 was sold for a very meagre amount and the sale was vitiated by fraud in publishing and conducting the sale.

7. Ram Naresh Singh carried a second appeal against the decision to the Board of Revenue. During the pendency of that second appeal, Ram Naresh Singh died and Mahadeo Prasad Singh, appellant 1, was substituted in his place. The Board dismissed the appeal on the ground that the auction sale with regard to the suit land in pursuance of the decree of the Judge, Small Causes Court, was void and, as such, did not invest the decree-holder-purchaser with any title and consequently, the possession of the appellant was without any title. The Board further held that the auction sale did not affect the suit under Section 209 of the U.P. Zamindari Abolition and Land Reforms Act.

8. To impugn the judgment of the Board, Mahadeo Prasad Singh, appellant herein, as well as respondents 6 to 10 filed a writ petition under Article 226 of the Constitution in the High Court of Allahabad. A learned Single Judge, who heard the writ petition, allowed it by his judgment, dated April 23, 1969, and quashed the judgments of the Board of Revenue as well as of the Additional Commissioner, who are respondents 2 and 3 herein. Following an earlier judgment of a Division Bench of the same court in Suraj Bux Singh v. Badri Prasad (AIR 1968 All 312), the learned Judge held that the execution sale of the suit land was proper as per the provisions of Section 42 of the Code of Civil Procedure; that prior to its amendment in U.P. by the U.P. Civil Laws (Reforms and Amendment) Act, 1954 the executing court had the same powers in relation to execution as it would have had if the decree had been passed by itself; that the decree in the present suit was passed on February 18, 1953, i.e. prior to the coming into force of the Amendment Act of 1954 and, as such, the amended Section 42 did not apply to it; and that the decree having been passed prior to the date of the amendment, should be executed in accordance with the provisions of Section 42 as it stood prior to its amendment; and that as a result, the suit for declaration as well as for possession would have to fail. The learned Single Judge did not go into the question as to whether the suit was barred by Section 47 of the Code of Civil Procedure.

9. Against the judgment of the learned Single Judge, respondent 1, herein, preferred a special appeal which was referred to a Full Bench of the High Court consisting of three learned Judges. The two Judges, in majority, held that the Small Cause Court had no power to execute the decree by attachment and sale of immovable property; that the transferee Court, namely, the Court of the

Munsif had the same powers as that of the Small Cause Court and, therefore, that Court also had no jurisdiction to execute the decree by attachment and sale of the immovable property; that the right to execute a decree by attachment and sale of immovable property is a matter of procedure, while the right to realise the decretal amount by attachment and sale is a substantive right of the decree holder; that the date on which the decree was put into execution, the amendment of Section 42 had already come into force and the power of the transferee court had become co-terminus with that of the transferor court; and that the amendment did not save the right of the appellant to execute the decree of the Small Causes Court by the attachment and sale of immovable property.

10. Sinha, J., however, dissented. He took the view that the Amendment Act did not apply to the present suit and that a substantive right had accrued to Ram Naresh Singh on the passing of the decree to execute it by attachment and sale of the immovable property and that right was clearly saved to him by virtue of Section 3 of the Amendment Act. In accordance with the view of the majority, the appeal of respondent 1 was allowed and the order of the learned Single Judge was set aside.

11. Hence this appeal by special leave by the appellants.

12. Thus, the principal question that falls to be considered in this appeal, is, whether the High Court, was right in holding that the execution sale of the land in dispute was totally without jurisdiction and null and void.

13. Some relevant dates may be noted. Ram Naresh obtained the decree from the Court of Small Causes on February 18, 1953. On the decree holder's application under Section 39 of the Code of Civil Procedure, the decree was transferred to the Court of the Munsif of January 24, 1955 and was put into execution after the U.P. (Amendment) Act, 24 of 1954 had come into force. This sale in favour of the decree holder himself took place on July 20, 1956. It was confirmed on August 29, 1956 and the sale certificate was issued to the purchaser on September 8, 1956. The auction-purchaser took delivery to possession as per Dakhnama on March 14, 1957. The decree-holder-purchaser further sold the plots in dispute to defendants 2 to 5.

14. Next, at this stage, the relevant provisions of the Code of Civil Procedure and the U.P. Civil Laws (Reforms and Amendment) Act (U.P. Act 24 of 1954) may be noticed.

15. Section 38 of the Code of Civil Procedure provides that "a decree may be executed either by the court which passed it or by the court to which it is sent for execution". In the instant case, as already seen, the decree was passed by the Small Cause Court which was competent to execute it, but (in view of Order 21, Rule 82 of the Code) not by attachment and sale of the immovable property of the judgment-debtor. That is to say, that Court could execute it by attachment and sale of the movable property of the judgment-debtor, if it was, of course, not exempt under Section 60 of the Code of Civil Procedure or under any other law.

16. Section 39 of the Code deals with transfer of decree. Its material part reads thus :

39. (1) The court which passed a decree may, on the application of the decree holder send it for execution to another court of competent jurisdiction, -

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other court, or

- (b) if such person has not property within the local limits of the jurisdiction of the court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other court, or
  - (c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the court which passed it, or
  - (d) if the court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other court.
- (2) The court which passed a decree may of its own motion send it for execution to any subordinate court of competent jurisdiction.

17. In the instant case, the decree was transferred under clause (d) of sub-section (1) of Section 39. Unlike the other clauses (a) to (c) of the sub-section, it seems, that under clause (d), the court has a rational discretion to transfer or not to transfer the decree passed by it. This is apparent from the word "may" used in the opening part of sub-section (1) and the requirement of recording reasons for the transfer under clause (d). It follows therefore, that under Section 39(1) a decree holder has no indefeasible right to get his application for transfer of decree to another court ipso facto accepted by the court which passed it, particularly in a case which is not covered by clauses (a), (b) and (c) of that sub-section.

18. Section 42 of the Code indicates the powers of the transferee court for executing a transferred decree. The material part of this section, prior to its amendment by the U.P. Act 24 of 1954, read as under :

The court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

The provisions in sub-sections (2), (3) and (4) of the section are not relevant for our purpose.

19. The U.P. Act 24 of 1954 amended with effect from November 30, 1954, Section 42 of the Code, and after that amendment sub-section (1) of the section read as under :

The court executing the decree sent to it shall have the same power in executing such decree as the court which passed it. All persons disobeying or obstructing the execution of decree shall be punished by such Court in the same manner as if it had passed the decree, and its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

Thus, for the words "as if it had been passed by itself" occurring in the first sentence of sub-section (1) of Section 42, the Amending Act 24 of 1954 substituted the words "as the court which passed it". The effect of such substitution was that the powers of the transferee court in executing the transferred decree became co-terminus with the powers of the court which had passed it. The result was that if the powers of the transferor court to execute its own decree were in any respect restricted, the same restriction would attach to the powers of the transferee court in executing the transferred decree; notwithstanding the position that the powers of the transferee court in executing

its own decree were not so restricted.

20. Section 3 of the U.P. Civil Laws (Reforms and Amendment) Act, saves certain rights already acquired or accrued. It is in these terms :

3. (1) Any amendment made by this Act shall not affect the validity, invalidity, effect or consequence of anything already done or suffered, or any right, title, obligation or liability already acquired, accrued or incurred or any release or discharge of or from any debt, decree, liability, or any jurisdiction already exercised, and any proceeding instituted or commenced in any court prior to the commencement of this Act shall, notwithstanding any amendment herein made, continue to be heard and decided by such court.

(2) Where by reason of any amendment herein made in the Indian Limitation Act, 1908, or any other enactment mentioned in Column 2 of the Schedule, the period of limitation prescribed for any suit or appeal has been modified or a different period of limitation will hereafter govern any such suit or appeal, then, notwithstanding any amendment so made or the fact that the suit or appeal would now lie in a different court, the period of limitation applicable to a suit or appeal, as aforesaid, in which time has begun to run before the commencement of this Act, shall continue to be the period which but for the amendment so made would have been available.

21. Before dealing with the contentions canvassed, we may remind ourselves of some well known principles of interpretation in regard to the retrospective operation of statutes. As a general rule, a statute which takes away or impairs substantive rights acquired under the existing law is construed to have a prospective operation unless the language of that statute expressly or by inevitable intendment compels a contrary construction. But this presumption as to prospective operation of a statute does not apply to an enactment affecting procedure or practice such as the Code of Civil Procedure. The reason is that no person has a vested right in any course of procedure. "The general principle indeed seems to be that alterations in the procedure are always retrospective, unless there be some good reason against it."

22. In the light of the above principles, the question posed for our decision, resolves itself into the twofold issue : Whether the decree holder had acquired a substantive right (a) to get the decree passed by the Court of Small Causes, transferred to the Court of the Munsif and (b) thereafter to have it executed by the transferee Court in any of the modes provided in Section 51 of the Code of Civil Procedure, including the mode by attachment and sale of the immovable property of the judgment-debtor.

23. As before the High Court, here also, it is contended on behalf of the decree holder that he had acquired this twofold substantive right before the coming into force of the U.P. (Amendment) Act 24 of 1954, and, as such, it was saved by Section 3(1) of this Amendment Act.

24. It is maintained that the twofold right aforesaid is a substantive right and not merely a matter of procedure. Support for this argument has been sought from a decision of this Court in *Garikapati v. Subbiah Choudhry* (AIR 1957 SC 540 : 1957 SCR 488 : 1957 SCJ 439). Reference has also been made to a Division Bench judgment of the Allahabad High Court in *Suraj Bux Singh v. Badri Prasad* (AIR 1968 All 312).

25. In the alternative, it is submitted that assuming the sale was without jurisdiction, then also, that question would relate to the execution, discharge or satisfaction of the decree and, as such, the remedy of the judgment-debtor was to proceed by an application under Section 47 of the Code of Civil Procedure and not by a suit as has been done by the plaintiff in the instant case. In short, the argument is that in any event, the present suit was barred by Section 47 of the Code.

26. It appears to us that none of these contentions stands a close examination.

27. It may be noted that the fasciculus of Sections 51 to 54 of the Code of Civil Procedure appear under the heading "Procedure in Execution". Section 51 is captioned - "Powers of court to enforce execution". It reads thus :

Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree holder, order execution of the decree -

(a) by delivery of any property specifically decreed;

(b) by attachment and sale or by sale without attachment of any property;

#(c) \* \* \*##

(d) by appointing a receiver; or

(e) in such other manner as the nature of the relief granted may require :

Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons recorded in writing, is satisfied ....

28. This section "merely enumerates the different modes of execution in general terms while the conditions and limitations under which alone the respective modes can be availed of are prescribed further on by different provisions". The opening words of the section "subject to such conditions any limitations as may be prescribed" put it beyond doubt that there is no wide or unrestricted jurisdiction to order execution or to claim execution in every case in all the modes indicated therein. 'Prescribed' has been defined in Section 2(16) of the Code to mean "prescribed by rules", and "rules", under Section 2(18) means "rules and forms" contained in the First Schedule of the Code or framed by the respective superior courts in different States under Section 122 or Section 125.

29. We are one with the High Court (majority) that this phrase cannot be construed to mean that the powers of the executing Court under this section are not subject to the other conditions and limitations enacted in the other sections of the Code. For instance, the mode, (b), by attachment and sale of the property of the judgment-debtor, may not be available in respect of property which falls within the exemption of Section 60 of the Code. Although, ordinarily the decree holder has an option to choose any particular mode for execution of his money decree, it will not be correct to say that the court has absolutely no discretion to place any limitation as to the mode in which the decree is to be executed. The option of the judgment-debtor, for instance, to apply under Order 21, Rule 30, CPC for execution of a decree simultaneously against both the persons and the property of the judgment-debtor is subject to exercise by the court of judicial discretion vested in it under Order 21, Rule 21, CPC.

30. We have already noticed, that under Section 39(1)(d), the decree holder has no indefeasible, substantive right to get a decree of a Court of Small Causes passed in his favour transferred to another court. Cases are conceivable where the decree is of such a petty amount that the Court of Small Causes thinks that it can easily be executed by it by attachment and sale of the movable property of the judgment-debtor. In the instant case, also the decree was for a small amount of Rs. 360 and odd and we understand that the application for transfer was made under clause (d) of Section 39(1). Thus, the decree holder's right to make an application for transfer of his decree under Section 39(1)(d) is a mere procedural right. The Court of Small Causes could in its discretion, for reasons to be recorded, refuse to transfer it to the Court of the Munsif. In other words, the decree holder had no vested or substantive right to get the decree transferred to the Court of the Munsif for execution. The first limb of the issue is therefore answered against the appellant.

31. As regards the second limb of the issue, we find ourselves entirely in agreement with the High Court that the provisions of Section 51 are merely procedural in character. A decree holder gets a right to execute the decree only in accordance with the procedure provided by law in force at the time when the execution is sought. If a mode of procedure different from the one which obtained at the date of the passing of the decree, has been provided by law, the decree holder is bound to proceed in execution according to the altered procedure.

32. The Amendment Act 24 of 1954 had taken away the power of the transferee Court to execute the transferred decree by attachment and sale of the immovable property by making it co-terminus with that of the transferor Court which, in the instant case, was the Small Cause Court and in view of the prohibition contained in Order 21, Rule 82, Code of Civil Procedure, had no power to execute its decree by sale of immovable property. That being the position, the Court of the Munsif to whom the decree had also been transferred for execution, had also no jurisdiction to order sale of the immovable property of the judgment-debtor. Thus considered, the sale of the immovable property ordered by the Munsif in execution of the decree of the Court of Small Cause transferred to him, was wholly without jurisdiction and a nullity.

33. Once we come to the conclusion that the sale in question was totally null and void, the alternative contention of the appellants with regard to the suit being barred by Section 47 of the Code of Civil Procedure, does not survive.

34. This is not a case of an irregular or voidable sale which continues to subsist so long as it is not set aside, but of a sale which was entirely without jurisdiction. It was no est in the eye of law. Such a nullity does not from its very nature, need setting aside.

35. As pointed out by this Court in *Kiran Singh v. Chaman Paswan* (AIR 1954 SC 340 : (1965) 2 SCR 117 : 1954 SCJ 514) :

... it is a fundamental principle, well established that a decree passed by a court without jurisdiction, is a nullity; and that its invalidity could be set up whenever it is sought to be enforced or relied upon, even at the stage of execution, and even in collateral proceedings.

36. Most of the rulings which have been cited in support of their alternative contention by the appellants, were also cited before the High Court and have been rightly distinguished. We need not go into the same.

37. Before we part with the judgment, we may, however, note that the amendment made by the U.P. Act 24 of 1954, was deleted by another U.P. (Amendment) Act 14 of 1970, and the unamended subsection (1) of Section 42, as it existed before the amendment of 1954, was revived. But, this Amendment Act 14 of 1970 was not given retrospective operation. It did not affect the previous operation of the Amendment Act 24 of 1954 or anything suffered or done thereunder.

38. For the foregoing reasons, we uphold the impugned judgment and dismiss this appeal. In view of the law point involved, we leave the parties to pay and bear their own costs.

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