

Smt. Periyakkal and Others

Vs

Smt. Dakshyani

Civil Appeal No. 3527 of 1979

(R.S. Pathak, D. Chinnappa Reddy JJ)

02.03.1983

JUDGMENT

CHINNAPPA REDDY, J. –

1. The respondent Dakshyani sued to recover a sum of Rs. 7,324.86 paise from Narayana Swami, husband of the 1st appellant and father of the rest of the appellants. The suit was decreed with costs and, in execution of the decree, certain property situated in Bangalore city was brought to sale. The decree-holder purchased the property at the execution sale hold on August 19, 1969. for a sum of Rs. 28,000. Narayana Swami having died in the mean while his legal representatives, the present appellants, the sale was set aside on July 31, 1974. the respondent filed a second appeal the parties entered into a compromise with the leave of the court, such leave being necessary since many of the present appellants were minors then and are minors even now. The court granted leave and made an order in terms of the compromise. The term of the compromise with which we are concerned is that the present appellants agreed to deposit and the present respondent agreed to receive a sum of Rs. 60,000 in full and final settlement of the decree. If the deposit was made on or before November 30, 1976, the sale which though confirmed by the trial court by set aside by the respondent was to stand dismissed. If the amount of Rs. 60,000 was not deposited on or before November 30, 1976 the second appeal was to stand allowed and the sale was to stand confirmed. The appellants were permitted under the compromise to raise funds by sale, mortgage etc. of the property in question. The appellants failed to deposit the amount in terms of the compromise. It appears that they were unable to raise the necessary funds as they could not evict the tenant who was in occupation of the property. Finally the appellants filed as application purporting to be under Sections 148 and 151 of the Civil Procedure Code to extend the time for depositing the sum of Rs. 60,000 in terms of the compromise dated June 24, 1976. The High Court dismissed the application on the ground that the court could not extend time where time had been stipulated by the parties themselves in the compromise arrived at between them. The High Court purported to rely upon the decision of this Court in *Hukumchand v. Bansilal*(AIR 1968 SC 86 : (1967) 3 SCR 695 : (1968) 2 SCJ 32).

2. Shri R. B. Data learned counsel for the appellants urged that there was no limitation on the power of the court to extend time under Section 148, CPC and that where a compromise had been made an order of the court it was certainly open to the court to extend time under Section 148, CPC. He relied upon the decision of the High Courts of Bombay and Calcutta in *Marketing and Advertising Associations Pvt. Ltd. v. Telerad Pvt. Ltd.*(AIR 1969 Bom 323 : 39 Com Cas 436 : (1969) 2 Comp LJ 91) and *Jadabendra Nath Mishra v. Manorama Debya*(AIR 1970 Cal WN 875 : ILR (1972) 1 Cal 281). He distinguished the decision of this Court in *Hukumchand v. Bansilal*(AIR 1968 SC 86 : (1967) 3 SCR 695 : (1968) 2 SCJ 32). Shri Javali learned counsel for the respondent, on the other hand urged that time should not be extended by the court, in law and on principle where the parties

themselves had agreed upon the time within which the amount was to be deposited.

3. In *Hukumchand v. Bansilal* (AIR 1968 SC 86 : (1967) 3 SCR 695 : (1968) 2 SCJ 32) the real question which was considered was, if a mortgaged property was sold in execution of a mortgage decree and if the application to set aside the sale under Order 21, Rule 90 was dismissed but time was granted by consent of parties for depositing the decretal amount etc. could time be extended for depositing the decretal amount etc. to avert the confirmation of sale, under Order 34, Rule 5, expert with the consent of the parties. The answer was 'no'. The court said on the dismissal of an application under Order 21, Rule 90 confirmation of sale under Order 21, Rule 92 had to follow as a matter of course. Order 34, Rule 5 merely permitted the deposit to be made at any time before the confirmation of the sale and there could be no question of extending the time for such deposit. If parties agreed to have the confirmation of sale postponed, further postponement would be possible by agreement of parties only. The Court would have no say in the matter. Section 148, CPC would have no application. The position was classified by the Court thus :

The judgment-debtor mortgagor had the right to deposit the amount at any time before confirmation of sale within 30 days after the sale or even more than 30 days after the sale under Order XXXIV, Rule 5(1) so long as the sale was not confirmed. If the amount had been deposited before the confirmation of sale, the judgment-debtors had the right to ask for an order in terms of Order XXXIV, Rule 5(1) in their favour. In this case an application under Order XXI, Rule 90 had been made and therefore the sale could not be confirmed immediately after 30 days which would be the normal course : the confirmation had to await the disposal of the application under Order XXI Rule 90. That application was disposed of on October 7, 1958 and was dismissed. It is obvious from the order sheet of October 7, 1958 that an oral compromise was arrived at between the parties in court on that day. By that compromise time was granted to the respondents to deposit the entire amount due to the decree-holder and the auction-purchaser by November 21, 1958. Obviously, the basis of the compromise was that the respondents withdrew their application under Order XXI, Rule 90 while the decree-holder society and the action-purchaser appellant agreed that time might be given to deposit the amount upto November 21, 1958. If this agreement had not been arrived at and if the application under Order XXI Rule 90 had been dismissed (for example, on merits) on October 7, 1958, the court was bound under Order XXI, Rule 92(1) to confirm the sale at once. But because of the compromise between the parties by which the respondents were given time upto November 21, 1958 the court rightly postponed the question of confirmation of sale till that date by consent of parties. But the fact remains that the application under Order XXI, Rule 90 had been dismissed on October 7, 1958 and thereafter, the court was bound to confirm the sale but for the compromise between the parties giving time upto November 21, 1958.

The Court then referred to the refusal of the Court to extend time by a fortnight on November 22, 1958 and further observed : The executing court refused that holding that time upto November 21, 1958 had been granted by consent and it was no longer open to it to extend that time. The executing court has not referred to Order XXI, Rule 92 in its order, but it is obvious that the executing court held that it could not grant time in the absence of an agreement between the parties because Order XXI, Rule 92 required that as the application under Order XXI, Rule 90 had been dismissed the sale and be confirmed. We are of the view that in the circumstances it

was not open to the executing court to extend time without consent of parties for time between October 7, 1958 to November 21, 1958 was granted by consent of parties. Section 148 of the Code of Civil Procedure would not apply in these circumstances, and the executing court was right to holding that it could not extend time. Thereafter it rightly confirmed the sale as required under Order XXI, Rule 92 there being no question of the application of Order XXXIV. Rule 3, for the money had not been deposited on November 22, 1958 before the order of confirmation was passed. In this view of the matter. We re of opinion that the order of the executing court refusing grant of the time and confirming the sale was correct.

4. In the case before us, the situation is totally different. Unlike the case of *Hukumchand v. Bansilal*(AIR 1968 SC 86 : (1967) 3 SCR 695 : (1968) 2 SCJ 32) where there was a statutory compulsion to confirm the sale on the dismissal of the application under Order 21, Rule 90 and, therefore postponement and further postponement of the confirmation of the sale could only be by the consent of the parties, in the case before us, there was no statutory compulsion to dismiss the application under Order 21, Rule 90 in the absence of an agreement between the parties. The court would have then decided the appeal arising out of the application on the merits. The parties, however, entered into a compromise and invited the court to make an order in terms of the compromise, which the court did. The time for deposit stipulated by the parties became the time allowed by the court and this gave the court the jurisdiction to extend time in appropriate cases. Of course, time would not be rewrite a contract between the parties but the court would relies against a forfeiture clause; And where the contract of the parties has merged in the order of the court, the court's freedom to act to further the ends of justice would surely nor stand curtailed. Nothing said in *Hukumchand* case(AIR 1968 SC 86 : (1967) 3 SCR 695 : (1968) 2 SCJ 32) militates against this view. We are, therefore of the view that the High Court was in error in thinking that they had no power to extend time. Even so, Shri Javali submitted that this was not an appropriate case of granting any extension of time. We desire to express no opinion on that question. The High Court will decide that question. We accordingly, set aside the judgment dated January 15, 1979 of the High court and direct the High court to dispose of I. A. No. VIII in Execution Second Appeal No. 89 of 1974 afresh in accordance with law. The parties will bear their own costs.

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