

Mohd. Yunus

Vs

Mohd. Mustaqim and Others

Special Leave Petition (Civil) No. 9148 of 1980

(A. N. Sen, E. S. Vankataramiah JJ)

04.10.1983

JUDGMENT

A. P. SEN, J. -

1. This special leave petition directed against the judgment and order of the Delhi High Court dated September 3, 1980 must fail as the decision of the High Court on merits is unassailable. But in view of the growing tendency of litigants of by-passing the normal remedy of an appeal or revision by moving the High Court with petitions under Article 227 of the Constitution, we deem it necessary to give the reasons therefor.

2. It appears that the property belonging to the surety Mohd. Salam comprised of a house situate at Katra Sheikh Chand, Lal Kuan, Delhi was sold by the Subordinate Judge, Delhi in execution of an ex parte decree in favour of Mohd. Mustaqim due to the failure of the judgment-debtor Hakim Mazhar-ud-Din to satisfy the decree on May 24, 1972. On June 9, 1972 the surety made an application under Section 151 of the Code of Civil Procedure, 1908 without specifying whether it was under Order XXI, Rule 89 or Rule 90. The learned Subordinate Judge by his order dated June 10, 1972 treated the application to be under Order XXI, Rule 89 and the surety opted to elect it as such and prayed for time to deposit the solatium equal to 5 per cent of the purchase money for payment to the auction-purchaser Chuni Lal, but failed to make such deposit till his death on July 22, 1972. At no stage of the proceedings did the surety assert that the decree had been satisfied out of court, nor did he make an application under Order XXI, Rule 2 for certification of adjustment. He died leaving behind him a son named Mohd. Karim and a daughter named Mst. Rabia Khatoon, both of whom were apparently settled in Pakistan. After his death, on August 11, 1972, the petitioner who is a total stranger to the estate of the deceased-surety, made an application stating that his name be substituted as he was the grand-nephew of the surety and also his heir and successor-in-interest under an alleged will executed by the surety on July 20, 1972 i.e. two days before his death. On the same day, there was an application moved by the decree-holder stating that the surety had already made payment of the decretal amount and costs to him before the sale was held on May 24, 1972 and that full satisfaction of the decree may be recorded. The respondent, who is the auction-purchaser, contested the claim of the petitioner and pleaded inter alia that the genuineness of the alleged will is open to question apart from its validity as it was affected by the doctrine of marz-ul-maut and that, in any event, the alleged adjustment could not affect his right or title to the property in dispute as an auction-purchaser.

3. The learned Subordinate Judge by his order dated November 23, 1972 held that there was no question of allowing the substitution of the name of the petitioner by the court under its inherent powers. On December 15, 1972 the petitioner moved another application under Section 151 of the Code for setting aside the sale on the ground that there was material irregularity in publishing and

conducting the same and also to record satisfaction of the decree and set aside the sale. That application of his was disallowed by the learned Subordinate Judge by his order dated November 9, 1973 on the ground that his earlier order dated November 23, 1972 holding that the application made by the surety purporting to be under Order XXI, Rule 89 stood disposed of as he did not comply with the requirements of Rule 89, operated as *res judicata*, and no question of invocation of the inherent powers of the court arose and further that the application made by the petitioner treated as an application under Order XXI, Rule 89 was barred by limitation as it was filed beyond the period of 30 days prescribed by Article 127 of the First Schedule to the Limitation Act, 1963.

4. Dissatisfied with the impugned by the learned Subordinate Judge, the petitioner moved the High Court under Article 227 of the Constitution. The contention before the High Court was that there was fraud perpetrated by the decree-holder in bringing the property in dispute to sale although there was full satisfaction of the decree by the surety before his death. The High Court instead of dismissing in limine the petition under Article 227 of the Constitution as not maintainable, declined to interfere with the impugned orders of the learned Subordinate Judge because it was satisfied that the application made by the petitioner construed as an application made under Order XXI, Rule 89 to set aside the sale was barred both by the principle of constructive *res judicata* and also by limitation inasmuch as it was governed by the Article 127 of the First Schedule to the Limitation Act, 1963.

5. We fail to see the propriety of the petition moved by the petitioner in the High Court under Article 277 of the Constitution. The rule is well-established that there can be no certification of an adjustment between the decree-holder and the judgment-debtor under Order XXI, Rule 2 after an auction-sale is held in a case where a third party's interest intervenes. In such a case, the court has no alternative but to confirm the sale under Order XXI, Rule 92 of the Code. In *Seth Nanhelal v. Umrao Singh* [(1931) 58 IA 50, 56], the Judicial Committee of the Privy Council in dealing with Order XXI, Rule 2 of the Code held that an adjustment between the decree-holder and the judgment-debtor come to at any time before the confirmation of an execution sale cannot nullify the decree by taking away the very foundation of the court's power to execute the decree viz. the existence of a decree capable of execution. In dealing with the question, the Privy Council observed :

In the first place, Order 21, Rule 2, which provides for certification of an adjustment come to out of court clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment-debtor and the decree-holder, and when no other interests have come into being. When once a sale has been effected, a third party interest intervenes, and there is nothing in this rule to suggest that it is to be disregarded. The only means by which the judgment-debtor can get rid of a sale, which has been duly carried out, are those embodied in Rule 89 - namely, by depositing in court the amount for the recovery of which the property was sold, together with 5 per cent on the purchase money, which goes to the purchaser as statutory compensation, and this remedy can only be pursued within thirty days of the sale : see Article 166, Schedule 1 of the Indian Limitation Act, 1908.

The Privy Council further observed :

That this is so is,, clear under the wording of Rule 92, which provides that in such a case (i.e., where the sale has been duly carried out), if no application is made under Rule 89 "the court shall make an order confirming the sale and thereupon the sale

shall become absolute".

6. The petition under Article 227 of the Constitution was wholly misconceived. An appeal lay from an order under Order XXI, Rule 92 setting aside or refusing to set aside a sale, under Order XLIII. Rule 1(j) to the District Judge. That apart, the application made by the petitioner claiming to be the legal representative of the surety, the judgment-debtor's representative, on the one hand and the auction-purchaser, the decree-holder's representative, on the other alleging that there had been a fraud perpetrated by the decree-holder in causing the sale to be held, with a prayer for recording satisfaction of the decree under Order XXI, Rule 2, raised a question relating to the execution, discharge or satisfaction of the decree and therefore fell within the purview of Section 47 which prior to February 1, 1977 was appealable because then a decision under Section 47 was deemed to be a decree under Section 2(2) of the Code, and therefore the petitioner had the remedy of an appeal to the District Judge. Even if no appeal lay against the impugned orders of the learned Subordinate Judge, the petitioner had the remedy of filing a revision before the High Court under Section 115 of the Code. Upon any view of the matter, the High Court had no jurisdiction to interfere with the impugned orders passed by the learned Subordinate Judge, under Article 227 of the Constitution. A mere wrong decision without anything more is not enough to attract the Jurisdiction of the High Court under Article 227.

7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is limited "to seeing that an inferior court or tribunal functions within the limits of its authority", and not to correct an error apparent on the face of the record, much less an error of law. In this case there was, in our opinion, no error of law much less an error apparent on the face of the record. There was no failure on the part of the learned Subordinate Judge to exercise jurisdiction nor did he act in disregard of principles of natural justice. Nor was the procedure adopted by him not in consonance with the procedure established by law. In exercising the supervisory power under Article 227, the High Court does not act as an appellate court or tribunal. It will not review or re-weigh the evidence upon which the determination of the inferior court or tribunal purports to be based or to correct errors of law in the decision.

8. The special leave petition is accordingly dismissed.

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