

Ganpat Singh (Dead) By Lrs

Vs

Kailash Shankar and Others

Civil Appeal No. 2841 of 1986

(M. M. Dutt, E. S. Vankataramiah JJ)

08.05.1987

JUDGMENT

DUTT, J. -

1. This appeal on a certificate granted under Article 134-A of the Constitution of India is at the instance of the heirs and legal representatives of deceased judgment-debtor and is directed against the judgment of a learned Single Judge of the Rajasthan High Court whereby the learned Judge upheld the order dated December 12, 1980 of the learned District Judge, Jaipur City, Jaipur, holding that in view of Article 136 of the Limitation Act, 1963 the application of the decree-holder auction-purchaser for delivery of possession of the property auctioned-purchased by him was maintainable and not barred by limitation. The certificate on the basis of which the appeal is filed is not competent in view of clause (3) of Article 133 of the Constitution; we have however treated the appeal as one under Article 136 of the Constitution. The special leave to file the appeal is granted by us.
2. The mortgagee decree-holder in execution of the final decree for mortgage himself purchased the disputed property in the auction sale held on July 14, 1978 at sum of Rs. 38,000. On September 20, 1978, the judgment-debtor Ganpat Singh, since deceased, the predecessor-in-interest of the appellants, filed an application under Order XXI Rule 90 of the Code of Civil Procedure for setting aside the sale. Two other petitions of objections were filed by one Chiranji Lal and by another judgment-debtor, Mst. Abhey Kanwar. All these objections including the application of Ganpat Singh under Order XXI Rule 90 of the Code of Civil Procedure, were dismissed for default and, consequently, the sale was confirmed by the learned District Judge, the executing court, on January 2, 1979.
3. On July 17, 1980, that is more than one year after sale was confirmed, the decree-holder auction-purchaser filed an application under Order XXI Rule 95 of the Code of Civil Procedure for delivery of possession of the property auctioned-purchased by him. The said application was opposed by the judgment-debtor Ganpat Singh on the ground that as the application was filed more than one year after the confirmation of sale, it was barred by limitation under Article 134 of the Limitation Act.
4. It was held by the learned District Judge that in view of the provision of Explanation II of Section 47 which was inserted in the Code by Section 20 of the Code of Civil Procedure (Amendment) Act, 1974, Article 136 prescribing a period of limitation of 12 years for the execution of the decree and not Article 134 of the Limitation Act would apply. In the view of the matter, the learned District Judge held that the application was not barred by limitation as contended on behalf of the judgment-debtor and directed issuance of the warrant of possession in respect of the disputed property.

5. Being aggrieved by the said order of the learned District Judge, the judgment-debtor filed a revisional application under Section 115 of the Code of Civil Procedure before a learned Single Judge of the High Court. The view expressed by the learned District Judge commended itself to the learned Judge of the High Court. The learned Judge took a similar view that after the insertion of Explanation II to Section 47 of the Code of Civil Procedure, a purchaser of property at a sale in execution of a decree would be deemed to be a party to the suit in which the decree was passed and all questions relating to the delivery of possession of the property to such purchaser of immovable property would be questions relating to the delivery of possession of the property to such purchaser of immovable property would be question property would be question relating to the execution of the decree and, as such, Article 136 and not Article 134 of the Limitation Act would apply. Further, the learned Judge held, inter alia, that after the amendment of the Code of Civil Procedure, Article 134 and Article 136 of the Limitation Act becomes so inconsistent that both could not exist and, relying upon the principle that in cases where two articles are equally applicable, the rule that the article which keeps alive the right of the party must be preferred, the learned Judge held that Article 134 stood impliedly repealed by Section 47 of the Code of Civil Procedure read with Article 136 of the Limitation Act. In that view of the matter, the learned Judge dismissed the revisional application of the judgment-debtor under Section 115 of the Code Civil Procedure. The learned Judge, however, granted a certificate to the appellants for appeal to this Court under Article 134-A of the Constitution of India. Hence this appeal.

6. At this stage, it may be stated that the parties have settled their disputes after the hearing was concluded, the respondent decree-holder having agreed to relinquish all his rights as the auction-purchaser upon the appellants paying him a sum of Rs. 1,28,000. The terms of such settlement will be stated hereafter. In spite of such settlement, we think we should consider the view expressed by the learned District judge and by the learned single judge of the High Court that after the amendment of Section 47 of the Code of Civil procedure, an application under Order XXI Rule 95 of the Code will be governed by Article 136 of the Limitation Act and that, as held by the learned judge of the High Court, Article 134 stands impliedly repealed by Section 47 read with Article 136 of the Limitation Act.

7. Both the learned District Judge and the learned Judge of the High Court have been greatly influenced by the fact of the insertion of Explanation II under Section 47 the Code of Civil Procedure (Amendment Act, 1976. Explanation II provides as follows :

Explanation II. - [a] For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all question relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be question relating to the execution, discharge or satisfaction of the decree within the meaning of this section.

8. Under clause (a) of Explanation II the auction-purchaser shall be deemed to be a party to the suit in which the decree is passed. Under clause (b), all question relating to the delivery of possession shall be deemed to be question relating to the execution, discharge or satisfaction of the decree within the meaning of Section 47. Section 47 bars determination of any question relating to the execution, discharge or satisfaction of the decree in a suit. Such question shall be determined by the executing court. As has been already noticed, in view of clause (a) of Explanation II, the auction-purchaser shall be deemed to be a party to the suit in which the decree is passed and under clause (b)

of Explanation II all question relating to delivery of possession shall be deemed to be question relating to the execution, discharge or satisfaction of the decree. Such question, thereof, are to be determined by the court executing the decree and not by a separate suit.

9. Section 47 itself has nothing to do with the question of limitation. Article 136 prescribes a period of limitation of 12 years for the execution of a decree from the date on which the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods when default in making any payment or delivery in respect of which execution is sought, takes place. After a decree is put into execution within the period of limitation under Article 136, question relating to execution, discharge or satisfaction of the decree may arise and such question including the question as to the delivery of possession shall be determined by the executing court. When a property is sold in execution of a decree, an application for setting aside the sale may be made under Rule 89, 90 or 91 of Order XXI of the Code of Civil Procedure by the persons and on grounds as mentioned therein. Such an application has also to be made within the prescribed period of limitation of sixty days from the date of sale under Article 127 of the limitation Act, 1963. Article 134 prescribes a limitation of one year for an application for delivery of possession by a purchaser of immovable property at a sale in execution of decree. The limitation of one year will be computed from the date the sale becomes absolute. Such an application for delivery of possession can be filed only after the decree is put into execution within they period of limitation as prescribes by Article 136 of the Limitation Act. The periods of limitation prescribed by Articles 136 and 134 are for two different purposes, the former being for the execution of a decree for possession in respect of which decree is passed and the latter for an application for delivery of possession of immovable property which is purchased in the course of execution of a decree. The two articles have nothing in common for their operation and it is not readily understandable how the two articles stand in conflict with each other. An application for delivery of possession of immovable property purchased in execution cannot, by any stretch of imagination, be construed as an application for execution of a decree for possession of property so as to invoke the provision of Article 136 of the Limitation Act. Merely because the auction-purchaser will be deemed to be a party in the suit in which the decree has been passed, as provided in clause (a) of Explanation II to Section 47 of the Code, and by virtue of clause (b) of Explanation II all questions relating to delivery of possession of the property shall be deemed to be questions relating to execution, discharge or satisfaction of the decree within the meaning of Section 47, an application for delivery of possession under Order XXI Rule 95 of the Code of Civil Procedure cannot be equated with an application for the execution of a decree for possession so as to apply 12 years period of limitation as prescribed by Article 136 of the Limitation Act.

10. If it is held that Article 136 would apply to an application for delivery of possession under Order XXI Rule 95 of the Code, it may lead to an absurdity. Suppose a decree is put into execution on the last day of limitation of 12 years. Obviously, the sale of any property in execution of the decree will take place after the expiry of 12 years and, therefore, no application for delivery of possession of the property by the auction-purchaser will be maintained as 12 years have already passed from the date of the decree. If the article 136 is held top apply to an application for delivery of possession, then for the very same reason it will also apply to an application for setting aside sale. In other words, an application for setting aside sale can also be made within a period of 12 years from the date of decree irrespective of the date of sale, which is absurd on the face of it.

11. It appears that the learned judge of the High Court has misunderstood the scope of the provision of Section 47 of the Code of Civil Procedure and that of the provisions of Articles 134 and 136 of the Limitation Act, 1963. It may be that before the amendment of section 47 of the Code, an

auction-purchaser could file a suit for recovery of possession of the property within 12 years from the date of sale, but in view of the amendment of Section 47 of the Code such a suit cannot be filed. But that is no ground for holding that Article 136 of the Limitation Act would apply to an application for delivery of possession. Under the old Limitation Act of 1908, an application for delivery of possession could be made within three years from the date on which sale became absolute as prescribed by Article 180 of that Act, but under the article 134 of the Limitation Act, 1963 such application can be made within one year from the date on which sale became absolute. Thus the period of limitation for delivery of possession of property purchased at the court sale has been reduced to a considerable extent, but that also cannot be taken into consideration for the purpose of interpretation of the provisions of the Limitation Act. It is for the legislature to prescribe the period and court is only to see whether any particular application has been filed within that period. In the instant case, as stated already, the scope of Articles 134 and 136 and their subject-matters being completely different, the question of implied repeal of Article 134, as held by the learned Judge of the High Court, does not all arise. We would accordingly, hold that Article 134 will apply to an application under XXI Rule 95 of the Code of Civil Procedure by the auction-purchaser for delivery of the property sold in execution of a decree.

12. It may be mentioned here that Mr. Krishnamurthy Iyer, learned counsel appearing on behalf of the decree-holder respondent, has not made any attempt to support the judgment of the High Court on the ground of amendment of Section 47 of the Code of Civil Procedure or on the ground of implied repeal of Article 134 of the Limitation Act by the amended of Section 47 of the Code read with Article 136 of the Limitation Act. On the contrary, it is contended by him that there can be no doubt that limitation under Article 134 commences from the date when the sale becomes absolute. He has, however, sought to support the conclusion of the learned Judge of the High Court that the application for delivery of possession of the property is not barred by limitation on another ground which will be stated presently. Under Order XXI Rule 92 where no application is made under Rule 89, Rule 90 or Rule 91 or where such application is made and disallowed, the court shall make an order confirming the sale, and thereupon the sale shall become absolute. It is submitted by the learned counsel that it is not correct that the sale becomes absolute only under the circumstances as mentioned in Rule 92, and that apart from the provision of Rules 89, 90 and 91 of Order XXI of the Code, an auction sale can be challenged on grounds other than those mentioned in the said rules. Counsel submits that if an application for setting aside sale is made and disposed of, the sale will become absolute after the disposal of such application, even though the application is not one as contemplated by Rule 89, 90, or 91 of order XXI of the Code.

13. In this connection, the learned counsel has drawn our attention to an application for setting aside the sale made by the fourth judgment-debtor on January 27, 1979 on grounds other than those mentioned in Rule 89, 90 or 91. But the said application was dismissed missed by the learned District Judge on July 21, 1979, It is submitted by the learned counsel that on the disposal of that application on July 21, 1979, the sale became absolute and the decree-holder respondent having filed the application for delivery of possession on July 17, 1980, that is, within one year from July 21, 1979, it should be held that the application was quite within the period of limitation as prescribed by Article 134 of the Limitation Act. In support of the contention, the learned counsel has placed reliance upon a decision of the Privy Council in Chandra Mani Saha v. Anarjan Bibi ((AIR 1934 PC 134 : 150 IC 11 : 38 CWN 901 : 67 MLJ 79 : 61 IA 248). In that case, in interpreting the words "when the sale becomes absolute" in Article 180 of the old Limitation Act, 1908, Privy Council observed as follows :

Upon consideration of the sections and orders of the Code, their Lordships are of

opinion that in construing the meaning of the words "when the sale becomes absolute" in Article 180, Limitation Act, regard must be had not only to the provision of Order XXI Rule 92(1) of the schedule to the Civil Procedure Code, but also to the other material sections and orders of the Code, including those which relate to appeals from orders made under Order XXI, Rule 92(1). The result is that where there is an appeal from an order of the Subordinate Judge, disallowing the application to set aside the sale, the sale will not become absolute within the meaning of Article 180, Limitation Act, until the disposal of the appeal, even though the Subordinate Judge may have confirmed the sale, as he was bound to do, when he decided to disallow the above mentioned application.

14. We may now consider the above contention or the learned counsel for the respondent decree-holder. It has been already noticed that on January 2, 1979 while dismissing the application of the judgment-debtor under XXI Rule 90 of the Code of Civil Procedure, the learned District Judge confirming the sale is binding not only on the judgment-debtor, who made the application under Order XXI Rule 90, but also on all other parties to the execution proceedings including the fourth judgment-debtor. Accordingly, there can be no doubt that the application filed by the fourth judgment-debtor praying for the setting aside of the sale on grounds other than those mentioned in Rules 89, 90 and 91, was not maintainable after confirmation of the sale. Indeed, by the order dated July 21, 1979 the learned District Judge while dismissing the application of the fourth judgment-debtor observed that after the confirmation of the sale, the court was not authorised to entertain the application. We do not think that the decision of the Privy Council in Chandra Mani case (AIR 1934 PC 134 : 150 IC 11 : 38 CWN 901 : 67 IA 248) lends any support to the contention of the learned counsel for the respondent decree-holder that an auction sale can be set aside even on grounds other than those mentioned in Rules 89, 90 and 91. All that has been ruled in that decision is that in construing the meaning of the words "when the sale becomes absolute" in Article 180 of the old Limitation Act, regard must be had not only to the provision of Order XXI Rule 92(1) of the Code, but also to the other material section and order of the Code including those which relate to appeals from order made under Order XXI Rule 92(1). No provision of the Code has been pointed out to us under which a sale can be set aside apart from the provisions of Rules 89, 90 and 91 of Order XXI of the Code. There can be no doubt that when an application for setting aside the sale is made, the order passed by the executing court either allowing or dismissing the application will be final and effective subject to an appeal that may be made under the provisions of the Code. It is inconceivable that even though no appeal has been filed against an order dismissing an application for setting aside the sale, another application for setting aside the sale can be made without first having the order set aside. Such an application will be barred by the principle of res judicata. In the circumstances, there is no merit in the contention made on behalf of the respondent decree-holder that the application for delivery of possession having been made within one year of the dismissal of the application of the fourth judgment-debtor for setting aside the sale, it was within the period of limitation as prescribed by Article 134 of the Limitation Act.

15. In *Kamakshi Ammal v. Arukkani Ammal* (AIR 1957 Mad 440 : (1957) 1 Mad LJ 180 : ILR 1957 Mad 662), which has been relied on by the learned counsel for the decree-holder respondent, there was an application under Order XXI Rule 58 of the Code of Civil Procedure by one Nagammal who claimed under a possessory mortgage and that claim was allowed on June 14, 1913. The decree-holder filed a suit to set aside this claim as she was entitled to do under the Code before it was amended in 1976. The suit terminated in a compromise decree on August 16, 1944 and the application under Order XXI Rule 95 of the Code was made by the decree-holder on August 14 1947, that is, within three years from the date when the claim-suit was disposed of. It was held by

the Madras High Court that the sale could not be said to have become absolute till the claim-suit was finally disposed of on August 15, 1944. In holding that, the Madras High Court has placed reliance upon the decision of the Privy Council in Chandra Mani Case (AIR 1934 PC 134 : 150 IC 11 : 38 CWN 901 : 67 MLJ 79 : 61 IA 248) to the effect that though the third column of Article 180 of the old Limitation Act refers to the date when the sale becomes absolute, that clause must be read not only with the provision of Order XXI Rule 92(1) of the Code, but also with the other material provisions and orders of the Code.

16. In our opinion the above decision of the Madras High Court in Kamakshi Ammal case (AIR 1957 Mad 440 : (1957) 1 Mad LJ 180 : ILR 1957 Mad 662) does not support the contention of the respondent decree-holder. Order XXI Rule 58 of the code is a material provision relating to any claim that may be preferred or any objection that may be made to the attachment of any property in execution of a decree. Any sale that is held wound, undoubtedly, be subject to the order that may be passed under Order XXI Rule 58 of the Code and, thereafter, as provided in the Code before its amendment in 1976, the result of a suit that may be filed challenging such order passed by the executing court under Order XXI Rule 58. But after a sale becomes absolute on the dismissal of the application of the judgment-debtors claim for setting aside the sale, another application for setting aside the sale by the judgment-debtor is not maintainable and the period of limitation as prescribed by Article 134 of the Limitation Act cannot be computed from the date of the dismissal of the second application for setting aside the sale.

17. The decision of the Madras High Court in Badrabahu Nainar v. Devendra Nainar (ILR (1969) 1 Mad 175), relied on by the respondent decree-holder, does not appear to be of any assistance to him. In that case, the Madras High Court has only followed the decision of the Privy Council in Chandra Mani case (AIR 1934 PC 134 : 150 IC 11 : 38 CWN 901 : 67 MLJ 79 : 61 IA 248). In an earlier decision of the Full Bench of the Madras High Court in Muthu Korakkai Chetty v. Madar Ammal (ILR (1920) 43 Mad 185 (FB) also relied on by the respondent decree-holder, what happened was that after an auction sale had been confirmed without opposition on April 26, 1913, an application was made on January 13, 1914 to set it aside on the ground of fraud, and it was set aside on June 26, 1915 in respect of a part of the properties sold. The auction-purchaser applied on February 17, 1917 for delivery of the remaining properties. It was held by Full Bench that the application was not barred under Article 180 of the old Limitation Act as time should be computed from the date of the order disallowing the petition to set aside the sale on the ground of fraud and not from the date of the first confirmation. This decision has been strongly relied upon by the learned counsel for the respondent decree-holder and it is submitted that even though the application for setting aside the sale on the ground of fraud was made after the sale was confirmed, the Full Bench took the view that the period of limitation under Article 180 of the old Limitation Act should be computed from the date of the order disallowing the application to set aside the sale on the ground of fraud and not from the date of the first confirmation. On the basis of this decision, it is urged that in the instant case also the period of limitation under Article 134 should be computed from the date of dismissal of the second application for setting aside the sale.

18. We are unable to accept the contention. In the Full Bench decision of the Madras High Court the application for setting aside the sale was made by the sons of a deceased judgment-debtor and the remaining judgment-debtors, and the application insofar as it was made by the sons of a deceased judgment-debtor was admitted out of due time on the ground of fraud. In our opinion the High Court was justified in entertaining the application on the ground of fraud by the sons of a deceased judgment-debtor who were not brought on the record as the legal representatives of their deceased father. The application was, therefore, quite maintainable and, even though the sale was confirmed

and became absolute under Order XXI Rule 92, it was subject to the disposal of the application for setting aside the sale on ground of fraud. The facts of this decision are quite different from those of the instant case before us. The application by the fourth judgment-debtor not being maintainable in law, the respondent decree-holder was not entitled to complete the period of one year under Article 134 of the Limitation Act from the date of dismissal of the second application by the fourth judgment-debtor. The contention made on behalf of the respondent decree-holder is without substance and is overruled.

19. In view of the discussion made above, we set aside the judgment of the learned Single Judge of the High Court and that of the learned District Judge.

20. As stated already, the parties have settled their disputes, the respondent decree-holder having agreed to relinquish all his rights as the auction-purchaser upon the appellants paying him a sum of Rs. 1,28,000. We are told that the said sum has been deposited in this Court in the above appeal and, as prayed for by the parties, we by our order dated May 5, 1987 set aside the execution sale and directed that the amount of Rs. 1,28,000 lying in this Court would be paid to the respondent decree-holder or to his counsel in full settlement of the mortgage decree. By the said order we have also recorded full satisfaction of the mortgage decree passed in O.S. No. 10/73 on the file of the District Judge, Jaipur City, obtained by the respondent decree-holder against the appellants and others. It has also been recorded in the order that the decree-holder auction-purchaser has no sort of claim against the appellants under the mortgage deed in question or the decree passed thereon. The two suits which have been filed by the decree-holder auction-purchaser against the Posts and Telegraph Department for recovery of arrears of rent in respect of the suit premises have, on the prayer made on behalf of the decree-holder auction-purchaser, been directed to be dismissed by the trial court without costs, since the money payable thereunder has been deposited in this court by the Posts and Telegraph Department. The Posts and Telegraph Department has been directed to pay the rent of the premises in suit in their occupation including arrears, if any, which may have accrued subsequent to the period for which rent has already been deposited in this Court, to the appellants treating them as landlords.

21. Even though the matter has been settled between the parties as above, we felt the necessity of laying down the correct legal position and, hence, this judgment.

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