

SUPREME COURT OF INDIA

Mahakal Automobiles

Vs.

Kishan Swaroop Sharma

C.A.No.2598 of 2005

(Dr.Arijit Pasayat and S.H. Kapadia,JJ.)

02.04.2008

JUDGMENT

Dr.Arijit Pasayat, J.

1. Challenge in this appeal is to the judgment of learned Single Judge of the Madhya Pradesh High Court, Indore Bench.

2. Background facts in a nutshell are as follows:

“Respondent had sold 7200 sq.ft. land with some construction on 15/11/1986 for Rs.7.20 lacs to the JDs/appellants and was paid only Rs.1.60 lacs. He had agreed to accept the remaining amount of Rs.5.60 lacs in 4 installments in 3 years with interest @ 1.50% per month. A charge was created on this property. Respondent had later filed a Civil Suit No. 13-A/89 (New No. 6-A/1991) for recovery of amount of Rs.6,31,750/- by sale of such property.

JDs/appellants in their written statements had admitted liability to pay Rs.5 lacs as principal and Rs.65,000/- as interest and pendente lite interest @ 1% per month. They disputed that Babulal was the partner of M/s Mahakal Automobiles. Thus, the ADJ on 24/9/1991 gave a judgment and decree under Order XII Rule 6 of the Code, relevant portion of which reads follows:

"As a result application of plaintiff is partly allowed and it is hereby ordered that defendants Nos. 1 and 3 shall pay within 6 months from today Rs.5,65,000/- and interest @1% per month on Rs.5 lacs from the date of institution of suit i.e. 16/6/1989, otherwise the plaintiff would be entitled to get a final decree for recovery of his amount by sale of charged property. Order as to cost would be given at the time of disposal of other points. A preliminary decree be framed accordingly. Description of charged property be also given in preliminary decree."

A preliminary decree was accordingly drawn up. However, it was not drawn in prescribed form No.5-A or 7-C of Schedule of Appendix-D to the Code of Civil Procedure, 1908 (in short 'the Code'). Admittedly, no accounts were to be taken. Simple arithmetical calculation of interest would have specified the actual amount payable.

On 28/4/1992 respondent filed an application for execution. Notices to all JDs/appellants under Order XXI Rule 22 of the Code were issued. On 8/6/1992, JDs/2 appeared through Shri L.P. Bhargava, Advocate while JD/1 appeared through Shri P.K. Modi, advocate. All JDs continued to appear regularly till 16/11/1993. In the meantime two applications; one under Order XXI Rule 58 read with Section 151 of the Code was filed on 8/6/1992 and the second under order XXI rule 50 read with Section 151 of the Code was filed on 2/11/1992 by the JDs which were disposed of on 16/12/1992 and 2/11/1992 respectively. No question as to non-executability of the decree had been raised by the JDs according to the High Court.

On 16/10/1992 the court below directed that name of Babulal Gupta be deleted from the execution application as there had been no decree against him. A question was also raised suo motu by the court whether the decree in its terms being preliminary decree could be executed as it is, or the DH-respondent be directed to obtain a final decree. The executing court granted several adjournments for arguments on this question. On 12/2/1993 the executing court stayed the proceedings of the execution to await the result of proceedings under Order I Rule 10 and Section 151 of the Code before the trial court in the original case which was also pending in the same court. On 8/3/1994 order of the High Court was received in the original case and the execution proceedings were ordered to be restarted. The execution proceedings as well as the civil suit were transferred from court to court and none appeared for the JDs in the execution case, till 14/7/1997.

The High Court by the impugned order set aside the order of the trial court holding that the I.As. filed by the judgment debtors, respondents in the appeal, before High Court were to be dismissed. Auction sale in favour of the respondent-DH was valid and order of its confirmation was upheld.

3. In support of the appeal learned counsel for the appellant submitted as follows:

“(i) Records reveal that no Process Fee was paid by the Decree Holder as per Order dated 4.10.1997.

(ii) Attachment of Warrant was not as per Order 21 Rule 54 (1A) CPC.

(iii) No Notice was given to the appellants when execution proceedings got delinked from the suit and got transferred from one court to another.

(iv) Attachment proceedings were carried out in the absence of the Judgment Debtor.

(v) No notice was given to the appellant under Order 21 Rules 54 and 66(2). The procedure under Order 21 Rule 54 (1A) and 66(2) is mandatory. Hence, the objections taken by way of IA Nos. 1, 2 and 6 should have been accepted

(vi) The Court found total absence of drawing up of the proclamation of sale and its terms by judicial application of mind.

(vii) It was held that the executing court did not follow the mandatory procedure as provided under the Code.”

4. It was submitted that the High Court by the impugned order erroneously reversed the judgment on the ground that the appellant could be presumed to have known of the proceeding and it is not a case of complete non issue of service of attachment of warrant and that ratio of the decision in *Deshbandhu Gupta v. N.L. Anand @ Rajinder Singh*¹ does not apply.

5. Learned counsel for the respondent on the other hand submitted that the High Court has analysed the factual position in the background of legal position as set out by this court.

6. When a property is put up for auction to satisfy a decree of the Court, it is mandatory for the Court executing the Decree, to comply with the following stages before a property is sold in execution of a particular decree:

“(a) Attachment of the Immoveable Property:”

Judgment Referred.

¹(1994) 1 SCC 0131