ALLAHABAD HIGH COURT

Dhoom Chand Jain

Vs.

Chaman Lal Gupta

Special Appeal No. 527 of 1960. , against judgment passed by Sahai J.
(M.C. Desai, C.J. and S.N. Dwivedi, J.)

28.11.1960. 27.02.1962

JUDGMENT

Dwivedi, J.

1. Chaman Lal Gupta, the respondent, instituted suit No.27 of 1949 for recovery of about Rs. 11,000/- from the appellant, his brother Daya Chand Jain, and Shambhu Lal and Sons, their joint family business. During the pendency of the suit Chaman Lal Gupta got an order of attachment before judgment of bungalow No.1 B.P. Jain Road, of quarters Nos.1 to 12 and 13 to 24, British Infantry Bazar, of No.116, Cowshed, Royal Artillery Bazar and of No. 46, Royal Artillery Bazar. The suit was decreed for Rs. 11,646/-approximately on August 13, 1956. On April 4. 1957 Chaman Lal Gupta applied for execution of his decree by sale of the aforesaid attached properties. It appears that Mainawati, a sister of the appellant and Dayal Chand Jain, also held a money decree against them. In execution of her decrees she also applied for sale of the aforesaid properties. Thus at one and the same time two decree-holdeds, Chaman Lal Gupta and Mainawati, were proceeding against the aforesaid properties. It appears that the said properties were sold first in execution of Mainawati's decree. Chamnn Lal filed an objection in her execution case. His objection was allowed and the sale was set aside on may 24, 1958. But before that on November 21, 1957, those properties were also sold in the execution proceedings started by Chaman Lal Gupta himself. The appellant moved an application fosetting aside the sale in the execution case started by Chaman Lal Gupta under Rule 90 of Order 21 Civil Procedure Code. The application was dismissed by the execution Court, It held that the appellant had no interest in the properties in dispute and that no substantial prejudice had been caused to him by irregularities in the auction sale. The appellant then filed an appeal in this Court against the order of the execution Court dismissing his application. The leaded

single Judge dismissed it on a preliminary ground that the appellant's objection could not be entertained for his failure to deposit security as required by clause (b) of the proviso to R.90. This special appeal against the order of the learned single Judge has been preferred under Rule 5 of Chapter VIII of the Rules of Court. This rule is a replica of Clause 10 of the Letters Patent and is made under Article 225 of the Constitution

2. Learned counsel for the respondents has raised a preliminary objection that the special appeal is barred by the provisions of section 104 Civil Procedure Code. Sub-section (1) of section 104, in so far as it is material in this case, provides that an appeal will lie only against those orders against which an appeal is provided for in Rule 1 of Order 43 Civil Procedure Code. The appeal before the learned single Judge was preterred under sub-section (1) of section 104 read with Rule 1 of Order 43. Sub-section (2) of section 104 provides that no second appeal shall lie against an Order made in an appeal under sub-section (1). The Legislature, which enacted sub-section (2), was competent to enact a law taking away the appellate jurisdiction under Clause 10 of the Letters Patent, and apparently sub-section (2) would bar this special appeal. Learned council for the appellant has however argued that the jurisdiction of entertaining special appeal survives the impact of sub-section (2) of section 104 behind the shield of section 4, Civil Procedure Code. Sub-section (1) of section 4, which alone is material here, provides that in the absence of any specific provision to the contrary nothing in the Code shall be deemed to limit or otherwise affect any special law in force or any special jurisdiction or power conferred by or under any other law for the time being in force. The power of the High Court to entertain a special appeal is a special jurisdiction or power conferred on it by its Letters Patent earlier and now by Rule 5 of Chapter VIII of the Rules of Court, and sub-section (2) of section 104 cannot be said to be a specific provision contrary to clause 10 or Rule 5. It cannot therefore freeze that special jurisdiction or power.

3. Reliance is placed on *Muhammad Naimullah Khan v. Ihsanullah Khan,* [1] and *Piarelal v. Madanlal,* [2] The first case was decided under the Civil Procedure Code 1882, which did not contain any provision analogous to section 4 of the present Code. That decision is not good law now. The second case was decided under the present Code, but the learned Judges were not referred to section 4. It was not followed by the Court Subsequently (*Ram Sarup v. Mt Kaniz Ummehani,*) [3] and is now impliedly overruled by the Supreme Court (*Union of India v. Mohindra Supply Co ,* [4]

4. We therefore overrule the preliminary objection and proceed to decide the appeal on merits.

5. Rule 90 of Order 21, as amended by this Court, reads:-

> "90. (1) Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a ratable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:
> Provided that no application to set aside a sale shall be entertained -
> (a) Upon any ground which, could have been taken by the applicant on or before the date on which the sale proclamation was drawn up; and
> (b) unless the applicant deposit such amount not exceeding twelve and half per cent, of the sum realized by the sale or furnishes such security as the Court may, in its discretion, fix except when the Court for reasons to be recorded dispenses with the requirements of this clause;
> Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.
> (2) Where such application is refected the Court may award such costs to the decree-holder or the auction-purchaser or both as it may deem of and such cots shall be the first charge upon the security referred to in clause (b) of the proviso, if any."

6. Clause _(b) Of the proviso was added on June 1, 1957, and it is ex facie not retrospective. Chaman Lal Gupta applied for the execution of his decree on April, 4, 1957; the attached properties were sold on November 21, 1957; and the appellant moved his application under Rule 90 on December 20, 1957. It is argued that the appellant acquired a vested right to make an application according to Rule 90 as it stood on the date of the execution application, that is, on April 4, 1957 and that clause (b) would not accordingly apply to his application. Now, Rule 90 provides a remedy to the judgment-debtor for setting aside sale for car. tain defects, and clause (b) of the Proviso prescribes the condition for availing that remedy. It enacts a rule of procedure. It would, therefore, ordinarily govern all applications moved after its enactment in

execution proceedings whether initiated before or after its enactment. There is no vested right in mere procedure. Nor did the right to impeach the auction sale accrue to the appellant on the date of the filing of the execution application. It accrued only after the auction sale. Prior to that event the appellant could not even apprehend or anticipate that it would become necessary to challenge the auction-sale on grounds of fraud or material irregularity. Then it all rested in future; so there could not be a vested right *Hoosein Kasam Dada (India) Ltd v. State of Madhya Pradesh,* [5] and *State of Bombay v. M/s. Supreme General Films Exchange Ltd.,* [6] are distinguishable for it is well-settled that the right to appeal is a vested right, *parmeshwar Kurmi v. Bakhtawar Pandey,* [7] holds that a right to obtain review of judgment is a vested right and is of no assistance to us,

7. The argument that there is no breach of clause (b) unless and until the Court of its own accord has fixed the amount of deposit or of security does not look attractive. No duty is cast on the Court to act without invitation. Indeed it cannot exercise discretion unless the applicant furnishes necessary facts and prays for fixation of the amount of deposit or of security. Admittedly, nothing of the kind was done by the appellant.

8. The dictionary meaning of the word 'entertain' is to deal with; to admit to consideration. In its application to clause (a) the word bears the meaning of admitting to consideration. That clause enjoins the Court from considering the application on any ground which could have been taken on or before the drawing up of the sale proclamation. In its application to clause (b) the word should bear the same sense. Accordingly, while the court can not refuse to take an application which is not backed by deposit or security, it cannot judicially consider it. It is expected that the Court would ordinarily give an opportunity to the applicant to comply with clause (b), and would reject the application if clause (b) were still not complied with.

9. Section 122 Civil Procedure Code enables this Court to make rules regulating the procedure of Civil Courts. Section 128 provides that such rules shall not be inconsistent with the provisions in the Code and may provide for any matters 'relating to the procedure' of Civil Courts. It is not urged that clause (b) is inconsistent with any provision in the Code. The crucial point is whether the provision for a deposit or security for costs of the adversary party in the event of his success is a matter 'relating to the procedure' of Civil Courts. The key words are 'relating to' and 'procedure'. The expression 'relating to' has got wide meaning. It will authorize the making of a rule

which is incidental or ancillary to the regulation of 'procedure'. *United Provinces v. Mt. Atiqa Begum,* [8] The word 'procedure' is not capable of a precise definition, and broadly it means the mode in which courts proceed in a case.

10. The subject-matter of clause (b) is the provision for deposit of security for defraying the costs of the adversary party. Payment of costs to the winning party is a matter of procedure. The subject-matter of clause (b) is thus reasonably connected with a matter of procedure. And in so far as it requires an anticipatory warranty, it would be ancillary to a matter of procedure. That it is so is shown by certain provisions of the Code. Rule 10 of Order 41 empowers the appellate Court to demand from the appellant security for costs of the respondent even before the admission of his appeal. Similarly, under Rule 8 of Order 45 an appeal to Supreme Court is admitted by the High Court only if the appellant has furnished security as required by Rule 7. Section 17 of the Provincial Small Cause Courts Act is of a similar nature. In election law also election petitions and appeals should be backed by security for costs of the adversary party. All these instances show that an anticipatory warranty for costs of the adversary party is now recognized as a part of procedure. We are, therefore, unable to hold that clause (b) is in excess of the rule-making power of this Court.

11. Reliance is placed on *O.N.RM.M. Chettyar Firm v. Central Bank of India Ltd.,* [9] That decision is distinguishable. Firstly, it does not appear that learned, Judges were referred to the enlarging implication of the expression 'relating to' in section 128. Secondly, the rule in that case was entirely different from the rule before us in two respects; (1) deposit was required to be made along with the application and (2) the amount of the deposit was fixed and invariable. Clause (b) does not oblige an applicant to make a deposit along with his application. Nor does it make the amount of deposit invariable. It gives discretion to the Court to fix a lesser amount than twelve and half per cent, of the sum realized by the sale; the Court may even mitigate the vigour of the rule by requiring security instead of deposit and in proper oases it may for reasons to be recorded relax the rule altogether. Thirdly, learned Judges seem to be somewhat oppressed if we may say so, by the 'onerous' character of the rule. With respect, it seems to us that though that element is sometimes considered in testing the vires of a bye-law, it is not a relevant consideration in event of a challenge to the vires of a rule.

12. *Madurai Pillai v. T. Muthu Chetty,* [10] also does not assist the appellant, for the rule

for deposit of security for costs is more akin to the provision in the earlier case than to clause (b) and was enacted under section 9 of the Presidency Small Cause Courts Act which is not as widely phrased as section 128 of the Coda.

13. Our view, on the other hand, gets some support from *Brij Behari Lal v. Firm Srinivas Ram Kumar,* [11] *Upendra Nath Basu v. Pandaya Gulab Sarkar,* [12] and *Seeta Ramanjaneyuhi v. Ramayya,* [13]

14. It is urged that learned single Judge's order is erroneous for he should have given the appellant a chance to comply with clause (b) before dismissing the appeal. In our view no such duty is cast on the appellate Court. As the appellant had failed to make a deposit or furnish security in the execution Court, his application could not be entertained at all. We think that it is too late to except an opportunity of complying with clause (b) at the appellate stage.

15. The execution Court dismissed the appellant's application on the grounds that he had no locus standi and that he had not suffered any substantial injury by the alleged fraud or material irregularity. In spite of their previous auction-sale in favor of Mainawati Chamanlal put the disputed properties to auction-sale obviously on the assumption that the appellant was their owner. We therefore "fail to understand how he can object to the application on the ground that the appellant has no subsisting interest in the properties. It may be recalled that the sale in favor of Mainawati was later set aside on May 24, 1958. We are of the view that the appellant could maintain the application.

16. Assuming that there might have been some irregularity in publishing and conducting the sale the auction-sale cannot be set aside without proof of substantial injury to the appellant. There is no evidence to prove substantial injury. The sale fetched an aggregate sum of Rs. 22,300/-; the estimated value of the sold properties was shown as Rs. 20,000/- in the sale proclamation. Presumably in the case of Mainawati also the properties were auction-sold at about Rs. 22,000/-. Thus the appellant has failed to prove that he has sustained any substantial injury. It is urged that it is not necessary to establish substantial injury as the sale was vitiated by illegalities and not mere irregularities. But none of the infirmities pointed out to us are in our opinion illegalities in the sense that an illegality renders an act null and void.

17. For the reasons already discussed the application of the appellant under Rule 90 has rightly been dismissed. The appeal is also dismissed with costs.

Appeal dismissed.

Cases Referred.

1. ILR 14 All 226
2. ILR 39 All 191: (AIR 1917 All 325)
3. AIR 1937 All 165
4. 1962 All LJ 1 at p.7: (AIR 1962 SC 256 at p.262)
5. 1953 SCR 987: (AIR 1953 SC 221)
6. AIR 1960 SC 980
7. AIR 1933 All 20
8. 1941 All LJR 170
9. AIR 1937 Rang 419 (FB)
10. ILR 38 Mad 823: AIR 1914 Mad 287 (FB)
11. ILR 18 Pat 327: AIR 1939 Pat 248 (FB)
12. ILR 19 Pat 531: AIR 1940 Pat 264 (FB)
13. ILR (1941) Mad 203 AIR 1941 Mad 28 (FB)