

Basavantappa vs Gangadhar Narayan Dharwadkar & Anr on 10 September, 1986

Equivalent citations: 1987 AIR 53, 1986 SCR (3) 734, AIR 1987 SUPREME COURT 53, 1986 REV LR 465, 1987 (1) LANDLR 9, 1986 ALL CJ 677, (1986) JT 443 (SC), 1986 SCFBRC 398, 1987 (1) UJ (SC) 3, 1987 UJ(SC) 1 3, (1986) 2 APLJ 23, 1986 BBCJ 166, (1987) 1 LS 10, ILR 1986 KANT 4023, (1986) KER LJ 857, (1986) GUJ LH 1001, (1986) 2 LANDLR 610, (1986) 3 SCJ 553, 1986 (4) SCC 273, (1986) 12 ALL LR 686, (1986) ALL WC 1097, (1987) 1 CIVLJ 5, (1987) 1 LANDLR 9

Author: A.P. Sen

Bench: A.P. Sen, B.C. Ray

PETITIONER:

BASAVANTAPPA

Vs.

RESPONDENT:

GANGADHAR NARAYAN DHARWADKAR & ANR.

DATE OF JUDGMENT 10/09/1986

BENCH:

SEN, A.P. (J)

BENCH:

SEN, A.P. (J)

RAY, B.C. (J)

CITATION:

1987 AIR 53 1986 SCR (3) 734

1986 SCC (4) 273 JT 1986 443

1986 SCALE (2) 431

CITATOR INFO :

0 1990 SC 933 (3,16)

ACT:

Civil Procedure Code, 1908-order 21 Rule 92(2)- Sale in execution of decree-Setting aside of Application and deposit of amount-Period of limitation-Amendment-Necessity for.

Limitation Act, 1963 -Article 127-Application for setting aside sale-Limitation period-Sixty days-Necessity for amendment of order 21 Rule 92(2) CPC.

HEADNOTE:

The auction of the property of judgment-debtor no. 1, in execution of a money decree, was held on July 26, 1985. The highest bid of Rs.22,000 offered by the auction-purchaser was accepted. The case for confirmation of sale was fixed on September 30, 1985. In the mean while, judgment-debtor no. 1 deposited the bid amount on August 29, 1985 together with an application under O.XXI, r.90 read with s. 151 of the Civil Procedure Code for setting aside the sale. On September 6, 1985, he made another application under O.XXI r. 89 read with s. 151 of the Code and made a deposit of the balance amount.

The objection raised by the auction-purchaser that the deposit required by r. 89 not having been made within 30 days of the date of the sale as required by r. 92(2) of the Code, the sale was liable to be confirmed under sub-r. (1) thereof, was overruled by the Principal Munsif. This order was upheld by the High Court.

Dismissing the SLP, this Court,

^

HELD: 1. Under O.XXI, r. 89 as it now exists, both the application and the deposit must be made within 30 days of the sale. The failure to make such deposit within the time allowed at once attracts the consequences set-forth under sub-r. (2) of r. 92. [737 A-B]

2. The limitation prescribed for an application under O.XXI, r.

735

89 was 30 days from the date of sale under Schedule I, Art. 166 of the Limitation Act, 1908, now replaced by Art. 127 of the Limitation Act, 1963. Art. 127 has now been amended by Act 104 of 1976 and the words 'sixty days' have been substituted for the words 'thirty days'. [736 F-G]

3. As a result of this amendment, the limitation for an application to set aside a sale in execution of the decree including any such application by a judgment-debtor under O.XXI, r. 89 or r.90 is, therefore, sixty-days now. [736 G]

4. Sub-r. (2) of r. 92 of O.XXI of the Code is inconsistent with Art. 127 of the Limitation Act. The Parliament must enact the necessary change in law for an appropriate amendment of sub-r. (2) of r. 92 of the Code. [737 A-B]

In the instant case, the judgment-debtor no. 1 having deposited the decretal amount together with 5% of the purchase money and having made the application under O.XXI, r. 89 within sixty days of the sale i.e. within the period as provided by Art. 127 of the Limitation Act, the sale was liable to be set aside. [737 G-H]

5. The provision of O.XXI, rr. 89 and 92(2) of the Code of Civil Procedure and that of Art. 127 of the Limitation Act 1963, should receive harmonious construction. [737 F-G]

Thangammal & Ors. v. K. Dhanalakshmi & Anr., AIR 1981
Mad. 254, approved.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Special Leave Petition From the Judgment and order dated 26.3.1986 of the Karnataka High Court in C.R.P. 3084 of 1985.

Padmanabha Mahale, K.K. Gupta and Mrs. Leelawati Mahale for the Petitioner.

The order of the Court was delivered by SEN, J. In this special leave petition the short point involved is whether by reason of sub-r. (2) of r. 92 of order XXI of the Code of Civil Procedure, 1908, the deposit required by r. 89 not having been made within thirty days from the date of sale, the application made by the judgment-debtor was not maintainable. Sub-r. (2) of r. 92 has been amended by s. 72 of the Code of Civil Procedure (Amendment) Act, 1976 by adding the words "the deposit required by that rule is made within thirty days from the date of sale", the following "or in cases where the amount deposited under rule 89.. within such time as may be fixed by the Court" to prevent any controversy as to the power of the Court to extend the time to make good the deficit. Unfortunately, the words added speak of the deficiency owing to 'any clerical or arithmetical mistake' on the part of the depositor. The amended r. 92(2) now reads:

"92(2). Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, or in cases where the amount deposited under Rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the Court, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby."

The failure to deposit the amount entails confirmation of sale under O.XXI, r. 91(1) and thereupon the sale becomes absolute. The limitation prescribed for an application under O.XXI, r. 89 was thirty days from the date of sale under Schedule I, Art. 166 of the Limitation Act, 1908, now replaced by Art. 127 of the Limitation Act, 1963. The words "may apply to have the sale set aside on his depositing in Court" etc. show that not only the application, but also the deposit, should be made within thirty days from the date of sale. It is not enough to make the application within thirty days. Nor is it enough to make the deposit within thirty days. Both the application and the deposit must be made within thirty days from the date of sale. Art. 127 of the Limitation Act, 1963 has now been amended by Act 104 of 1976 and the words 'sixty days' have now been substituted for the words 'thirty days'. As a result of the amendment, the limitation for an application to set aside a sale in execution of a decree, including any such application by a judgment-debtor under O.XXI, r. 89 or r. 90 is therefore sixty days now. Such being the law, there is need for an appropriate amendment of

sub-r.

(2) of r. 92 of the Code. Under O.XXI, r. 89 as it now exists, both the application and the deposit must be made within thirty days of the sale. The failure to make such deposit within the time allowed at once attracts the consequences set forth in sub-r. (2) of r. 92. This is an unfortunate state of things and Parliament must enact the necessary change in law.

In the present case, the auction was held on July 26, 1985. The decree holder brought to sale in execution of a money decree for Rs.21,948.45p., the property of judgment-debtor no. 1 comprised of a house and open site appurtenant thereto. The highest bid of Rs.22,500 offered by the auction-purchaser was accepted and the bid was knocked down in his favour. The executing Court fixed the case for confirmation of sale on September 30, 1985. In the meanwhile, judgment-debtor no. 1 deposited Rs.22,000 on August 29, 1985 towards payment of the decretal amount together with an application under O.XXI, r. 90 read with s. 151 of the Code for setting aside the sale. Again, on September 6, 1985 he made another application purporting to be under O.XXI, r. 89 read with s. 151 of the Code and made a deposit of the balance amount. The auction-purchaser objected to the entertainment of the application contending inter alia that the deposit required by r. 89 not having been made within thirty days of the date of sale as required by r. 92(2) of the Code, the sale was liable to be confirmed under sub-r. (1) thereof. It is undisputed that the judgment-debtor has deposited the entire decretal amount together with 5% of the purchase money by way of commission to the petitioner-auction-purchaser. The Principal Munsif, Dharwar by his order dated October 4, 1985 overruled the objection raised by the petitioner. A learned Single Judge (Kulkarni, J.) by his judgment dated March 26, 1986 declined to interfere with the order of the learned Munsif setting aside the sale. The learned Judge relying upon the decision of the Madras High Court in *Thangammal & Ors. v. K. Dhanalakshmi & Anr.*, AIR 1981 Mad. 254 held that the provisions of O.XXI, rr. 89 and 92(2) of the Code and that of Art. 127 of the Limitation Act should receive a harmonious construction. In that view, the learned Judge held that the judgment-debtor no. 1 having deposited the decretal amount together with 5% of the purchase money and having made the application under O.XXI, r. 89 of the Code within sixty days of the sale i.e. within the period as provided by Art. 127 of the Limitation Act, the sale was liable to be set aside. The learned Single Judge has brought about the inconsistency between sub-r. (2) of r. 92 of O.XXI of the Code and Art. 127 of the Limitation Act and suggested that steps should be taken to remove this inconsistency. We fully endorse the view expressed by the learned Single Judge.

In the result, the special leave petition must fail and is dismissed.

A.P.J.

Petition dismissed.