

Radhy Shyam vs Shyam Behari Singh on 12 August, 1970

Equivalent citations: 1971 AIR 2337, 1971 SCR (1) 783, AIR 1971 SUPREME COURT 2337, 1971 (1) SCR 783, 1970 CURLJ 779, 1970 SCD 942, 1971 (1) SCJ 650, ILR 1971 1 ALL 818

Author: J.M. Shelat

Bench: J.M. Shelat, C.A. Vaidyalingam

PETITIONER:

RADHY SHYAM

Vs.

RESPONDENT:

SHYAM BEHARI SINGH

DATE OF JUDGMENT:

12/08/1970

BENCH:

SHELAT, J.M.

BENCH:

SHELAT, J.M.

VAIDYIALINGAM, C.A.

CITATION:

1971 AIR 2337

1971 SCR (1) 783

ACT:

Letters Patent-Allahabad High Court-Clause 10-If order on Application under Order 21 r. 90 C.P.C. is a 'Judgement'. Civil Procedure Code, 1908, Order XXI, rules 69, 90-Material irregularity in auction sale What is.

HEADNOTE:

After the respondent had obtained a decree for about Rs. 9,000/against the appellant, the appellant's share in a house was put up for sale in execution proceedings initiated by him and a proclamation setting out the date and hour for the sale was issued. But the sale was postponed at the instance of the appellant. At the auction sale held on the adjourned date the respondent purchased the appellants share for Rs. 8,000/-. The appellant thereafter filed an application for setting aside the sale under Order XXI, r.90 C.P.C. on the ground that contrary to the provisions of r.69

the notice relating to the adjourned sale did not set out the hour when the auction would be held and that this omission was a material irregularity which vitiated the sale. Although the application was rejected by the Execution Court, a single judge of the High Court upheld the appellant's objection holding that the failure to set out the hour amounted to a material irregularity. However, a Division Bench in an appeal under clause 10 of the Letters Patent of the Allahabad High Court reversed the order. In appeal to this Court it was contended (i) that the order of the single judge was not a 'judgment' within the meaning of cl. 10 of the Letters Patent and hence no Letters Patent appeal could be filed thereunder; and (ii) that the sale suffered from a material irregularity which caused substantial injury to the appellant and was therefore liable to be set aside.

HELD: Dismissing the appeal,

(i) An order in a proceeding under O.XXI, r.90 is a 'judgment' inasmuch as such a proceeding raises a controversy between the parties therein affecting their valuable rights and the order allowing the application certainly deprives the purchaser of rights accrued to him as a result of the auction-sale. The High Court was there after right in holding that a Letters Patent appeal lay against the order of the single Judge. [789 C-D]

(ii) Rule 90 of O.XXI of the Code, as amended by the Allahabad High Court, inter alia provides that no sale shall be set aside on the ground of irregularity or even fraud unless upon the facts proved the Court is satisfied that the applicant has sustained injury by reason of such irregularity or fraud. Mere proof of a material irregularity such as the one under r.69 and even inadequacy of price realised in such a sale, in other words injury, is, therefore, not sufficient. It has further to be shown that such injury was the result of material irregularity. [789 E] The Division Bench of the High Court was right in holding, on the facts in the present case, that the appellant had failed to show inadequacy

784

of the price or that such inadequacy was occasioned by the said material irregularity. [789 G]

Standard Glass Beads Factory v. Shri Dhar, A.I.R. 1960 All. 692 (F.B.); Piare Lai v. Madan Lai, A.I.R. 1917 All. 325; Muhammad Naimullah Khan v. Ihsanullah Khan, (1892) 14 All. 226 (F.B.); Ram Sarup v. Kaniz Ummehani, I.Y.R. [1937] All. 886; Asrumati debi v. Kumar Rupendra Deb Raikot. [1953] S.C.R. 1159; Justices of the Peace for Calcutta v. Oriental Gas Co., 8 Beng. L.R. 433; Tuliaram v. Alagappa, I.L.R. 35 Mad. 1; Dayabhai v. Murugappa Chettiar, I.L.R. 13 Rang. 457; State of Uttar Pradesh v. Vijay Anand Maharaj, [1963] 1 S.C.R. 1, Begum Aftab Zamani v. Lai Chand Khanna, I.L.R. [1969] Delhi 34(F.B.); Shankarlal Aggarwal v. Shankar Lal Poddar, [1964] 1 S.C.R. 717; Mohan Lai Magan Lai Thacker v.

Gujarat, [1968] 2 S.C.R. 685; and Tarapore & Co. v. M/s. V/O Tractors Export, Moscow, [1969] 2 S C R 699 referred to.

JUDGMENT :

CIVIL APPELLATE JURISDICTION : Civil Appeal. No. 1569 of 1966.

Appeal by special leave from the judgment and order dated August 22, 1961 of the Allahabad High Court in Special Appeal No. 417 of 1959.

Avadh Behari, for the appellant.

Mohan Behari Lal, for the respondents.

The Judgment of the Court was delivered by Shelat, J. The respondent had obtained a decree for Rs. 9000/- and odd against the appellant. In execution proceedings taken out by him, the appellant's one fourth share in a house was put up for sale and a proclamation setting out the date and hour when the sale would be held was duly issued. The sale, however, was postponed to July 30, 1956 at the instance of the appellant and on his offering to pay a part of the decretal amount. At the auction sale held on the adjourned date the respondent himself purchased the said one fourth share of the appellant for Rs. 8000/-. The appellant filed an application for setting aside that sale under Order XXI, r. 90 of the Code of Civil Procedure on the ground that contrary to the provisions of r. 69 of that Order, the notice relating to the adjourned auction sale did not set out the hour when the auction would be held though the original proclamation under which the auction sale was to be held on the earlier date specified both the hour and the date. The appellant contended that the failure to mention the hour contravened Order XXI, r. 69 and that such a contravention was a material irregularity which vitiated the sale. The objection was overruled by the Execution Court. The appellant thereupon filed an appeal in the High Court where a single Judge upheld the objection holding that the failure to set out the hour amounted to a material irregularity, in consequence whereof the appellant had been prejudiced by the sale having fetched too low a value. On these findings the learned Judge allowed the appeal and set aside the auction sale. Aggrieved by the said order the respondent filed a Letters Patent appeal under cl. 10 of the Letters Patent of the Allahabad High Court and, rule 5 of Ch. VIII of the Rules of the High Court. A Division Bench of the High Court reversed the order passed by the learned single Judge and allowed the appeal. Following the Full Bench decision of that High Court in *Standard Glass Beads Factory v. Shri Dhar*(1) the Division Bench rejected the appellant's contention that no Letters Patent appeal lay against such an order and held that the order of the learned single Judge was a 'judgment within the meaning of cl.10 of the Letters Patent. The Division Bench further held that even assuming that the sale suffered from a material irregularity the learned single Judge was in error in holding that the appellant had established any prejudice to him in consequence of that irregularity. The order of the learned single Judge was reversed and the said sale was upheld. On the High Court refusing a certificate, the appellant obtained special leave from this Court and filed the present appeal. In support of the appeal counsel for the appellant raised two points: (1) that the said order of the learned single Judge

was not a judgment within the meaning of cl. 10 of the Letters Patent and hence no Letters Patent appeal could be filed thereunder, and (2) that the said sale suffered from a material irregularity which caused substantial injury to the appellant and was therefore liable to be set aside. Counsel cited certain decisions, in support of the contention that the order of the learned single Judge was not a 'judgment' within the meaning of cl. 10 of the Letters Patent. Some of these decisions however, are under ss. 109 and 110 of the Code of Civil Procedure and Arts. 133 and 134 of the Constitution which would have no bearing on the construction of cl. 10 of the Letters Patent. But before we enter into the controversy as to the meaning of the term judgment in cl. 10 it would be necessary to remember that the respondent having been declared as the, highest bidder became the purchaser of the appellant's one fourth share in the said property. No doubt the sale had to be confirmed by the Court under r.92 of O. XXI before it could become absolute and in the meantime the appellant could apply under r. 90 to have it set aside. If the Court, on such an application, were to pass an order setting aside the sale such an order would clearly affect the rights acquired by the respondent as a result of the sale. On the other hand, if the application were to be dismissed, such dismissal affects the right of the judgment-debtor under r. 90. The application under that Rule and the order made thereon, therefore, are not merely procedural matters but are matters affecting the rights of both the (1) A. I. R. 1960 All. 692 (F. B.) 9Sup.CI(P)171-6 auction purchaser and the judgment-debtor. The question is whether such an order setting aside the sale is a 'judgment' within the meaning of cl. 10 of the Letters Patent. At one time the view held by the Allahabad High Court was that no Letters Patent appeal could, lie against such an order. Thus, in *Piare Lai v. Madan Lal*(1) it held, following its earlier decision in *Muhammad Naimullah Khan v. Ibsanullah Khan*(2), that no appeal lay under cl. 10 of the Letters Patent from an order of a single Judge of the High Court dismissing an appeal from an order of an executing court on an application under O. XXI, r. 90. That decision, however, was rendered, on a view that s. 104(2) of the Code debarred even a Letters Patent appeal under cl. 10. Subsequently, the High Court abandoned that view and held in *Ram Sarup v. Kaniz Ummehani*(3) that S. 104(2) did not affect Letters Patent appeals from an order thereby falling in line with the other High Courts (see Mulla, Code of Civil Procedure, (13th ed.) 452). None of these decisions was on the question whether an order made under O. XXI r. 90 was a 'judgment' or not.

In *Standard Glass Beads Factory v. Shri Dhar* (4) the High Court of Allahabad construed the term judgment as including a final judgment as also a preliminary and an interlocutory judgment and observed that it did not exclude an order. On this view it held that an order passed by a single Judge of the High Court dismissing an appeal against an order of interim injunction was a 'judgment' within the meaning of cl. 10 of the Letters Patent, and a Letters Patent appeal, therefore, lay thereunder against it. Reliance, however, was placed on the decision in *Asrumat Debi v. Kumar Rupendra Deb Raikot*(5) where the question was whether an order transferring a suit from a subordinate court to the High Court under cl. 13 of the Letters Patent of the Calcutta High Court was a 'judgment' within the meaning of cl. 15. This Court held that it was not. In doing so the Court referred to the divergence of opinion amongst the Calcutta, Madras and Ran on High Courts on the interpretation of the term 'judgment' in cl. 15 of the Letters Patent reflected in *Justices of the Peace for Calcutta v. Oriental Gas CO.*(6), *Tuljaram v. Alagappa*(7) and *Dadabhai v. Murugappa Chettiar*(8), but without resolving the divergence held that an order of transfer of a suit did not fall within any one of the three aforesaid views, and therefore, a Letters Patent appeal therefrom was not maintainable. Mukherjea, T. at page II 67 of the report stated that although in such a case there

would be a controversy between the parties as to whether the suit should be tried by the (1) A. I. R. 1917 All. 325.

(3) I. L. R. [1937] All. 886.

(5) [1953] S. C. R. 1159 (7) I. L. R. 35 Mad. 1.

(2) [1892] 14 All. 226 (F. B.) (4) A.I.R. 1960 All (P.D.) (6) 8 Beng. L. R. 433.

(8) L. R. 13 Rang. 457.

court where it was filed or in the High Court which had to be determined, a decision on any and every point in dispute between the parties to a suit was not judgment. Such an order did not affect the merits of the controversy between the parties in the suit itself, nor did it terminate or dispose of the suit on any ground, and therefore, could not be placed in the same category as an order rejecting a plaint or one dismissing a suit on a preliminary ground. It will be noticed that the order in question was on an application in the suit as a step in aid towards the determination of the controversy between the parties in the suit. It was, therefore, that the said observation was made that the order sought to be appealed against did not affect the merits of the controversy in the suit nor did it terminate or dispose of the suit. For an order to be a 'judgment' it is not always necessary that it should put an end to the controversy in the suit or should terminate the suit. Even the narrower definition of a 'judgment' as given by Couch, C.J. in the Justices Of the Peace for Calcutta⁽¹⁾ was that it must mean a decision which affects the merits of the question between the parties by determining some right or liability and such a decision might be either final or preliminary or interlocutory. The question as to when an order is -a judgment once again arose, in the State of Uttar Pradesh v. Dr. Vijay Anand Maharaj⁽²⁾. The question was whether an order passed by a single Judge of a High Court dismissing an application for a review of his earlier order was a judgment amenable to a Letters Patent appeal. The question arose in the following manner. The Additional Collector, Benaras' assessed the respondent to an agricultural income tax under powers conferred on him Under the U.P. Agricultural Income-tax Act, 1949. The respondent filed a writ petition in the High Court for quashing the said order on the ground of want of jurisdiction in the assessing officer. The writ petition was allowed and the assessment was quashed. As the State did not file any appeal against the said order, the order became final. In 1956, the State promulgated Ordinance No. II of 1956 which was, subsequently replaced by U.P. Act XIV of 1956. Under the Ordinance as also under the Act, the assessments made by the Additional Collector were retrospectively validated. Also, a right was conferred upon any party to the proceedings under the U.P. Agricultural Income-tax Act, 1949 wherein assessment was set aside on the ground of want of jurisdiction to apply for a review of the said proceedings in the light of the provisions of the Ordinance and the Act. Further, a statutory injunction was imposed upon the court to review such orders accordingly. Pursuant to the said provisions, the appellant-state applied to the High Court at Allahabad for review of the said order. The application was dismissed on the ground that neither the Ordinance nor the Act entitled the appellant to a review of an order passed in a writ petition under Aft, (1) 8 Beng. L. R. 433.

(1) (1963) (1) S. C. R. 1.

226." The appellant filed a Special appeal under Ch. VIII, r. 5 of the Rules of the High Court against the said order. That was dismissed inter alia on the ground that the said order of the single Judge was not a 'judgment'. On appeal, this Court, after referring to the aforesaid cleavage of opinion amongst the High Courts on the meaning of the term 'judgment', held that the order dismissing the application for review in any event fell within the narrower meaning given to it by the Calcutta High Court, and that therefore, the impugned order was a 'judgment' within the meaning of cl. 10 of the Letters Patent of the Allahabad High Court. This Court held that the said Ordinance and the Act conferred a fresh right upon a party to the earlier proceedings to have the previous order set aside and to have a decision from the Court on the basis 'of the amended Act, that this was a valuable and a substantive right conferred upon a party to the proceedings and that on the rival contentions the question of the fresh right conferred upon a party to the proceedings and the jurisdiction of the court to enforce the said right would be in issue and any decision thereon -could legitimately be said to be a decision determining the rights of parties. It also observed that the 'decision of the learned single Judge dismissing the writ petition was certainly a decision denying the right of the appellants alleged to have been conferred under the amending Act, and therefore,, the order dismissing the writ petition was a 'judgment' within the meaning of cl. 10 of the Letters Patent as also r. 5 of Ch. VIII of the Rules of the High Court, and therefore, the Division Bench of the High Court erred in holding that no appeal lay against the said order.

In Begum Aftab Zamwi v. Lal Chand Khanna('), the High Court of Delhi also has held that the expression 'judgment' in cl. 10 of the Letters Patent of the Lahore High-Court not only meant a judgment having the effect of a decree, but any order which affected the merits of a controversy between the parties by determining some disputed right or liability. In Shankarlal Aggarwal v. Shankarlal Poddae(2) the question was whether an order passed by a single Judge of the High Court confirming an auction sale during the winding up proceedings of the company was appealable. Since the Court heard that such an order ,was appealable under s. 202 of the Indian Companies Act, 1913, it did not go in to the question whether it was a 'judgment' within the meaning of cl. 15 of the Letters Patent. The, decision, therefore, does not help. Similarly, Mohan Lal Magan Lal Thacker v. Gujarat(1) and Tarapora & Co. v. M/s V/O Tractors Export, Moscow(') also are strictly not relevant as they were decisions on (1) I. L. R. [1960] Delhi 34 (F. B.) (3) [1968] 2 S.C.R. 685.

(2) [1964] (1) S. C. R. 717.

(4) [1969] (2) S. C. R. 699.

the meaning of the expression 'final order' in Arts. 133 and 134(1) (c) of the Constitution and not on the interpretation of the,, term judgment' in the Letters Patent of the High Courts.

There can be no doubt that an application under o. XXI, r. 90 to set aside an auction sale concerns the rights of a person declared to be the purchaser.' If the application is allowed, the sale is set aside and the purchaser is deprived of his right to have the sale confirmed. by the Court under r. 92. Such

a right is a valuable right, in that, upon such confirmation the sale becomes absolute, and the rights of ownership in the property so sold become vested in him. A decision 'in such a proceeding, therefore, must be said to be one determining the right of the auction purchaser to have the sale confirmed and made absolute and of the judgment-debtor, conferred by r. 90 to have it set aside and a resale ordered. In our view an order in a proceeding under o. XXI, r. 90 is a 'judgment' inasmuch as such a proceeding raises a controversy between the parties therein affecting their valuable rights and the, order allowing the application certainly deprives the purchaser of rights accrued to him as a result of the auction-sale. We, therefore, agree with the high Court that a Letters Patent appeal lay against the order of the learned single Judge. Rule 90 of o. XXI of the Code, as amended by the Allahabad High Court, inter alia provides that -no sale shall be set aside on the ground of irregularity or even fraud unless upon the facts proved the Court is satisfied that the applicant has sustained injury by reason of such irregularity or fraud. Mere proof of a material irregularity such as the one under r. 69 and inadequacy of price realised in such a sale, in other words injury, is therefore, not sufficient. What has to be established is that there was not only inadequacy of the price but that that inadequacy was caused by reason of the material irregularity or fraud. A connection has thus to be established between the inadequacy of the price and the material irregularity.

The learned single Judge found that the appellant had been prejudiced inasmuch as the said sale realised only Rs. 8,000/- though the value of the appellant's share was Rs. 20,000/-. This view was founded upon a report made by the Amin of the Execution Court in which that officer had valued the said share at Rs. 20,000/-. The Division Bench, however, held, and in our view rightly, that the learned single Judge was in error in relying upon that report. The record clearly shows that no notice was given to the respondent of the appellants application to have a commissioner appointed to value the property. The trial Court appointed the Amin as commissioner without any such notice and behind the back of the respondent. The Amin made his valuation without giving an opportunity to the respondent to be heard. No opportunity was ever given to the respondent to raise any objection to the said valuation. The report was filed in the trial court without any notice to the respondent. Indeed, no reference was made to the report in the trial court so that the trial court could not give any chance to the respondent to raise any contention against it. It was for the first time brought out before the learned single Judge who accepted it and held on the strength of it that the price realised at the sale was grossly inadequate. In these circumstances the Division Bench rightly held that the learned single Judge erred in relying on such a report.

Barring the report no evidence whatsoever was led by the appellant to show that his share in the said property was worth Rs. 20,000/-, and that therefore the price realised at the auction was inadequate. The Division Bench was, in our view, right in holding that the appellant had failed to 'show inadequacy of the price or that such inadequacy was occasioned by the said material irregularity. When it was realised that the contention as to the inadequacy of price cannot be sustained, counsel tried to argue that the said sale fetched Rs. 8,000/- only as the proclamation for sale had set out the value of the appellant's share at that amount only. No such grievance was made before the trial court, nor was such a grievance incorporated in the memorandum of appeal before the High Court. Also, no such ground has been taken in the special leave petition before this Court. Obviously, the appellant could not raise such a contention before the High Court, much less before

this Court.

Thus, the contentions raised by counsel for the appellant fail and consequently the appeal is dismissed with costs.

R.K.P.S.

Appeal dismissed.