

Sm. Premwati And Ors. vs Sm. Satyawati Jain And Ors. on 17 September, 1952

Equivalent citations: AIR1953ALL55, AIR 1953 ALLAHABAD 55

JUDGMENT

Kaul, J.

1. Both the above cases relate to the same order passed by the learned Civil Judge, Kanpur, and may conveniently be disposed of by one common judgment.

2. The material facts lie within a short compass. Shrimati Satyawati Jain along with some other persons obtained a decree against Shrimati Premwati, who is the appellant in Execution First Appeal No. 109 of 1952 and the applicant in Civil Revision No. 713 of 1952, on 29-10-1949. It was a final decree for sale in a mortgage suit. An application for execution was made by the decree-holders on 16-2-1950. Notices fixing the date for settlement of the particulars of the sale proclamation was issued on 7-2-1952. Owing to the death of His Majesty King George VI the Courts were closed on that date and the cases fixed for that date were taken up the next day. On 8-2-1952, the judgment-debtor filed objections mentioning a number of grounds against the execution of the decree. It was complained by her that inasmuch the decree-holder had not filed a written statement as was required by law for settlement of the particulars of the sale proclamation, she was unable to file a proper objection. It was ordered that the application be registered as a miscellaneous case under Section 47, Civil P. C., and be put up the next day. When the case was taken up, the objector was absent and the objections were dismissed for default. The main execution case was also taken up the same day and an order directing that a sale proclamation be prepared in accordance with the directions given was made. The sale proclamation was prepared accordingly and on 11-2-1952, it was ordered that a warrant be issued for holding an auction sale of the property on 26-3-1952,

3. It may be mentioned that according to the decree-holders, the property sought to be sold was worth Rs. 70,000. On 8-15-1952, the judgment-debtor made another application praying that the ex parte order passed against her on 9-2-1952, be set aside, the particulars of the sale proclamation be amended and the sale be stayed meanwhile. It was held by the learned Civil Judge that an application for setting aside an order like the one passed by him on 9-2-1952, did not lie and the application was dismissed. Dissatisfied with this order, the present appeal and the revision application have been filed. Mr. Varma, who appeared for the judgment-debtor, stated that he had filed his revision application by way of abundant caution.

4. A preliminary objection was raised by Dr. Asthana to the hearing of this appeal. Relying on the observations of Sulaiman J. in *Shyamkant Lal v. Rambhajan Singh*, A. I. R. 1939 F. c. 74 at p. 80,

Dr. Asthana contended that no appeal lay in the present case. This was contested by Mr. Varma, Having considered the matter carefully, we have come to the conclusion that the preliminary objection should prevail. It was laid down in the Federal Court case, to which reference has just been made that an order under Order 21, Rule 66, Civil P. C. is not a judicial adjudication of any question arising between the parties to the execution but merely the issuing of directions as to the mode of proclamation of sale. Sulaiman J, further observed:

"It is really difficult to see how the approximate estimation of the value of the property can ever be regarded as a determination of any question arising between the decree-holder and the judgment-debtor within the meaning of Section 47, Civil P. C."

He further added:

"There seems to be a perfect unanimity among all the Indian High Courts that the fixing of the value of the property under this rule (Order 21, Rule 66) is by no means an adjudication within the meaning of Section 47, Civil P. O. and such an order is not appealable as a decree."

He cited a large number of authorities including several cases of our own Court in support of the view taken by him. Mr. Varma sought to distinguish this case by saying that the observations were obiter and that they were not concurred in by the other two Judges constituting the Bench. Specific reference was made by him to the observations of Gwyer C. J. and Varadachariar J. at p. 77. He particularly invited our attention to the following passages:

"Our brother Sulaiman, though otherwise in agreement with us, holds that no appeal lies to this Court in the present case. We are unable to concur in that opinion. We think that the order of the High Court in this case must be treated as a final order for the purposes of Section 205, Constitution Act, if the appellant's application related only, to the settlement of the proclamation, it is true that an order dealing with that application could not be regarded as determining the rights of the parties in any measure so as to make it a final order. A question of this kind must be determined with reference to the substance of the dispute between the parties and not merely in the light of the fact that the application is one made to the Court before whom an application to execute a decree is pending."

We are unable to hold that the observation made by Sulaiman J., was obiter. It is true that the two other learned Judges composing the Bench did not agree with him that the question before the Court in that case was one entirely governed by the provisions of o. 21, Rule 66, Civil P. C. They pointed out that Sections 16 and 17, Bihar Money-lenders' Act, gave certain valuable rights to judgment-debtor whose case was covered by those sections. That would not, however, be sufficient ground to hold that the observations made by Sulaiman J., with regard to the correct nature of a proceeding under Order 21, Rule 66, Civil P. C., were obiter. This is clear from the observations made by Gwyer C. J., and Varadachariar J., at pages 77 and 78. They were of opinion that though Order 21, Rule 66, Civil P. C., was relevant to the case before them and did require consideration but

according to their view certain other provisions of the law were also not to be lost sight of. In this view of the matter Mr. Varma's contention that the observations made by Sulaiman J., were obiter cannot be accepted.

5. It will be further noted that the observations made by Sulaiman J., on the true character of the proceedings under Order 21, Rule 66, Civil P. O., were concurred in by the other two learned Judges composing the Bench. They dissented from him not on that point but were of opinion that the matter before them was not covered solely by the provisions of Order 21, Rule 66, Civil P. C. There were a large number of authorities to which reference was made by Sulaiman J., in support of his view including the following cases of our own Court viz., *Ajodhia Prasad v. Gopi Nath*, 39 ALL. 415; *Hira Lal v. Tikam Singh*, A. I. R. 1926 ALL. 401; *Mahomed Zakaria v. Kishun Narain*, A. I. R. 1926 ALL. 268; *Kaiser Beg v. Sheo Shankar Das*, A.I. R. 1932 ALL 85 and *Nathu Lal v. Yashotha Devi*, (A. I. R. 1932 ALL. 136) and *Ram Charan v. Jumna Prasad*, A. I. R. 1932 ALL. 696 (i) reported in the same volume at pp. 130 and 696. Referring to the last case, he pointed out that it was held in that case that an order fixing the valuation for the purposes of the sale proclamation was not a decree within the meaning of Section 47, Civil P. C. Then he referred to decisions of other High Courts but we do not consider it necessary for the purposes of the present case to mention them here. In this view of the matter the question seems to be concluded by authority.

Mr. Varma, however, invited our attention to three cases of the Patna High Court, viz. *Sri Kant Lall v. Ram Bhajan Singh*, A. I. R. 1940 pat. 422, *Raghunath Singh v. Hazari Sahu*, A. I. R. 1917 pat. 881 (P. b.) and *William Maling Grant v. Suraj Mal Marwari*, A. I. R. 1923 Pat. 134, and to a decision of their Lordships of the Privy Council in *Saadatmand Khan v. Phul Kuar*, 25 Ind. App. 146 (P. c.). We are clear that in none of these cases the question which arises before us came up for consideration directly. In *Saadatmand Khan v. Phul Kuar*, 25 Ind. App. 146 (P. c.), it was held that "a material misrepresentation (though made gratuitously by the decree holder and the Court) of the value of property contained in a proclamation of sale under Section 287, Civil P. C., is a material irregularity in publishing or conducting a sale in execution within the special remedy provided by Section 311 for setting such sale aside."

It will be noted that the old a. 311 of the Code of 1882, corresponded to our o. 21, Rule 90 of the present Civil P. C., 1908, and the finding of the Court arrived at in that case that the misstatement of the value of the property in that case could hardly have been made in good faith. Clearly such a matter could be agitated even now under Order 21, R. 90, Civil P. C. This case can be no authority for the proposition that an order directing that a certain amount be mentioned in the sale proclamation as the approximate value of the property sought to be sold is a judicial adjudication of any question arising between the parties to the execution. In *'Raghunath Singh v. Hazari Sahu*, A. I. R. 1917 Pat. 381, a Full Bench of the Patna High Court held that:

'It is the duty of a Court in preparing a proclamation of sale to state as fairly and accurately as possible in the proclamation the value of the property.'

But *Chamier C. J.* with whom *Sharfuddin* and *Atkinson JJ.* agreed expressly made it clear that it was not necessary for him for? the purposes of that case to consider the

question whether a revision under Section 115, Civil P. C. could be entertained in such circumstances. The revision application was, therefore, entertained under the provisions of Section 107, Government of India Act. As we know, that section was also altered subsequently, and under the corresponding provision in the Government of India Act, 1935, no such power as was exercised under Section 107 of the earlier Government of India Act could be exercised. Nor do the third Patna case referred to can be of any help to Mr. Varma's client. The question which now arises before us did not arise in that case. It was observed by Das J. who pronounced the judgment in *William Maling Grant v. Suraj Mal*, A.I.R. 1923 Pat. 134, that in the case before them the application of the judgment-debtors did not raise any question as to the terms on which the sale proclamation should be settled. It raised a different question altogether.

6. The facts in *Sri Kant Lall v. Ram Bhajan Singh*, A. I. R. 1940 rat. 422, were different from the facts of the case before us.

7. For the reasons given above, we are clear that no appeal lies in the present case.

8. We will next consider whether the revision application under Section 115, Civil P. C. is entertainable. We have followed the view expressed by Sulaiman J. in the Federal Court case to which reference has been made earlier in this order. According to him, the determination of the value to be inserted in the sale proclamation in a proceeding relating to the execution of decree is not a judicial adjudication of any question arising between the parties to the execution, but merely the issuing of directions as to the mode of proclamation for sale. Clearly, therefore, no question of exercise of any jurisdiction which did not vest in the Court or refusal to exercise jurisdiction properly vested in it, or exercise of its jurisdiction with material irregularity can arise in such a case. Accordingly no revision under Section 115, Civil P. C., can be entertained.

9. Mr. Varma as a last resort fell back upon the provisions of Article 227, Constitution of India, which gives the High Court a power of superintendence over all Courts and tribunals in this State. It was frankly conceded by the learned counsel for the applicant that if any injury is caused to the interests of his client by "the defective" sale proclamation which has been issued, he will be entitled to seek relief after the sale has been held under Order 21, RULE 90, Civil P. C. If any relief in respect of an injury can be claimed by another provision of the law, this Court would not exercise its jurisdiction under Article 227 of the Constitution, to grant such relief. This disposes of all the points raised by Mr. Varma.

10. We, therefore, dismiss the appeal as well as the revision application. The respondents shall get their costs of the appeal. No order is made as to costs in the revision application.