

Allahabad High Court

Kashi Ram And Ors. vs Mt. Hasmat Banoo on 9 December, 1930

Equivalent citations: AIR 1931 All 145

Author: Dalal

JUDGMENT Dalal, J.

1. This is an appeal in the execution department from a decree of the District Judge of Bareilly passed in appeal. Mt. Hashmat Banoo is the judgment-debtor, and the decree passed against her was for the recovery of money out of the assets of her deceased husband Anwar Husain. For the purposes of this appeal we need only mention the application for execution of 26th June 1927. In pursuance of this application certain properties were put to auction and were purchased by the decree-holder himself on 20th October 1927. The decree was thereby satisfied on 15th March 1928. Mt. Hashmat Banoo applied to the executing Court for the setting aside of the sale on the ground that she had no notice thereof. Presumably what was meant was that she was not notified either under Order 21, Rule 22 of the application for execution nor under Order 21, Rule 66 of the date of the preparation of the sale proclamation.' Possibly the two subordinate Courts have taken an indulgent view of the facts of case in holding that service on her was not sufficient. She is a pardanashin lady and in the nature of things service cannot be made on her personally. She was reported to be inside a house, and the summons was affixed on the gate. However it may be, the finding of fact is final that there was no proper service of notice.

2. The trial Court was not very definite, so we looked into the matter, and in both cases the service was made in the same manner as would be possible for service on a pardanashin lady. The first Court set aside the sale, but made a provision that the decree-holder may apply for execution again by sale of the property provided he proved that the transfers in favour of the lady were collusive and did not in reality pass the property to the lady. On appeal the learned District Judge kept the sale in suspense and did not set it aside. He directed the decree-holder to apply for an inquiry as to whom the property belonged. He explained that if the finding was that the property belonged to the lady the sale would automatically be rendered void, and if it was proved that the property did not belong to the lady the sale need not be interfered with. Such an order would lead to considerable confusion. The sale remaining in suspense the decree-holder may take no action whatever and enjoy the benefit of sale. Such an order cannot be upheld. The question before us is whether the sale should be set aside or not.

3. The respondent was not represented here. But Mr. Pathak, on behalf of the appellants has put fairly before us the case law on the subject. The matter for inquiry is whether the application of Mt. Hashmat Banoo was or was not barred by the period of limitation prescribed by Article 166, Lim. Act. The subordinate Courts have not noticed the addition to Col. 1 of that article made by Act No. 1 of 1927 which came into operation on 1st January 1928 prior to the application of Mt. Hashmat Banoo to have the sale set aside. Col. 1 of the article now reads as below:

Under the same Code (Civil Procedure Code) to set aside a sale in execution of a decree including any such application by a judgment-debtor.

the period prescribed is 30 days from the date of the sale.

4. The present application was made long after that period. The argument of the trial Court was that the application was one under Section 47, Civil P.C. and the period of limitation applying thereto was one of three years. There was a certain amount of conflict of opinion between the Calcutta and Madras High Courts as to whether Article 166, Lim. Act, applied to an application by a judgment-debtor under Section 47 or not. The addition to this [article has now set the controversy at rest. so it appears that what the legislature desired by the enactment of this (article was an application thereof to the provisions of Section 47 also. In *Satish Chandra v. Nishi Chandra Dutta* [1919] 46 Cal. 975 it was held by a Bench of two Judges that an application under Section 47, Civil P.C. for setting aside the sale of a property on the ground that it did not belong to the original judgment-debtor is governed by Article 166, Lim. Act and not Article 181. The view has been consistently adopted by that Court and was reaffirmed in *Haripada Haldar v. Baroda Prasad Roy* A.I.R. 1925 Cal. 351. A Full Bench of the Madras High Court would appear, without close examination to have held a different view in *Rajagopala Ayyar v. Ramanuja Charirar* A.I.R. 1924 Mad. 431. In that case however the sale in execution was held to be a nullity and for that reason the Judges were of opinion that the period of limitation for an application was one of three years. Only a few months previously a Bench of two Judges had held in *Paramasiva Thevar v. Pulukaruppa Thevar* A.I.R. 1924 Mad. 137, that an application by a judgment-debtor to set aside a sale held in execution on the ground that the proclamation of sale was not published in the village in which the property was situated fell under Article 166 and not under Article 181, Lim. Act. The same view was taken by another Bench of two Judges of the Madras High Court subsequently in *Muthu Kumaraswami Pillai v. Muthuswami Thevan* A.I.R. 1927 Mad. 394. In that case the properties of some one other than the judgment-debtor were sold in execution of a decree more than 30 days after the sale. The decree-holder purchaser found out his mistake and applied for further execution by setting aside the sale. It was held that Article 166, Lim. Act, applied and that the sale could not be set aside when the application was made more than 30 days after the sale. Mr. Pathak has also drawn our attention to the Calcutta case of *Manmatha Nath Ghose v. Lachnii Devi* A.I.R. 1928 Cal. 60. In that case however specific fraud was proved in so far that the decree-holder by certain means prevented notice of the sale reaching a pardanashin lady. In the present case there is no allegation that service was not made on Mt. Hashmat Banoo by reason of any action of the decree-holder. We are of opinion that the limitation applicable to this application was one of 30 days. The application of Mt. Hashmat Banoo was therefore barred by time. We set aside the decrees of the subordinate Courts and dismiss the application for the setting aside of the sale. Parties will bear their own costs throughout.