Supreme Court of India
Tribhuvandas Purshottamdas ... vs Ratilal Motilal Patel on 5 September, 1967
Equivalent citations: 1968 AIR 372, 1968 SCR (1) 455
Author: S C.
Bench: Shah, J.C.

PETITIONER:
TRIBHUVANDAS PURSHOTTAMDAS THAKUR

Vs.

RESPONDENT:
RATILAL MOTILAL PATEL

DATE OF JUDGMENT:
05/09/1967

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
SIKRI, S.M.
SHELAT, J.M.

CITATION:
1968 AIR 372 1968 SCR (1) 455
CITATOR INFO :
RF 1968 SC 822 (5)
R 1969 SC 69 (3)
R 1974 SC2192 (117)

ACT:
Code of Civil Procedure, 1908, O. 29, r. 89--Mortgage decree--Sale in execution of--Judgment-creditor extending time for payment of mortgage amount--Amount specified in proclamation of sale not deposited--If condition of rule satisfied.
Bombay Public Trusts Act, ss. 36(a) and 56B--'Sale' if includes court sale in execution of decree--Suit to enforce mortgage decree if suit or proceeding affecting public religious or charitable purpose--Precedents--Binding nature--Nature of order of reference to Larger Bench.

HEADNOTE:
The property of a trust was sold in execution of a mortgage decree. The trustees sought to set aside the sale under 0. 21, r. 89 of the Code of Civil Procedure, They deposited five per cent of the purchase money for payment to the auction purchaser and claimed that the mortgagee had agreed to give them time for payment of the mortgage amount, and

has agreed in the meantime to abandon the application for execution. The subordinate judge set aside the sale. In appeal the District Court reversed that order holding that since the trustees failed to comply with r. 89 of 0. 21 requiring the judgment-debtor to deposit in court for payment to the decree-holder the amount specified in the proclamation of sale for the recovery of which the sale was ordered, the executing court had no jurisdiction to set aside the sale. A single Judge of the High Court, in revision, set aside the order on the ground that the sale of the mortgaged property, which belonged to a public trust, without the sanction of the Charity Commissioner was prohibited by s. 36 of the Bombay Public Trust Act and was on that account invalid. The ,High Court remanded the case to the District Court. In appeal to this Court,

HELD:The order of the High Court should be set aside and that of the District Court restored.

(i)Transactions of mortgage, exchange or gift or lease of any immovable property in clauses (a) and (b) of s. 36 of the Bombay Public Trusts Act contemplated to be made by the Trustees are voluntary transactions and in the absence of any clear provision in the Act, the expression 'Sale' in cl. (a) only means transfer of property by the trustees for a price and does not include a Court sale in execution of a decree. [457F-G]

A suit to enforce a mortgage or a proceeding to enforce a mortgage decree against property belonging to a public trust is not a suit or proceeding in which a question affecting public religious or charitable purpose is involved within the meaning of s. 56B of the Act and therefore it is not obligatory upon the court to issue notice to the Charity Commissioner. [458C-D]

(ii) An order setting aside a Court sale in execution of a mortgage decree cannot be obtained under 0. 21 r. 89 of the Code of Civil Procedure by merely depositing five per cent of the purchase money for payment to the auction purchaser and persuading the decree holder to abandon the execution proceeding. [459G-H]

456

(iii)A Single Judge of a High Court is ordinarily bound to accept as correct judgments of Courts of coordinate jurisdiction and of Division Benches and of the Full Benches of his Court and of this Court. Any reference to s. 165 of the Evidence Act or the Oath of Office of a High Court judge is irrelevant and will not justify a judge in ignoring the rule relating to the binding nature of precedents.

Jaisri Sahu v. Rajdewan Dubey, [1962] 2 S.C.R. 558; Lala Shri Bhagwan v. Shri Ram Chand, [1965] 3 S.C.R. 218; Pinjare Karimbhai v. Shukla Hariprasad, 3 Guj. L.R. 529; Haridas v. Ratansey, 23 Bom. L.R. 802; and State 'of Gujarat v. Gordhandas, 3 Guj. L.R. 269.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 500 of 1965. Appeal by special leave from the judgment and order dated February 5114, 1963 of the Gujarat High Court in Civil Revision Application No. 597 of 1961.

M. V. Goswami, for respondents Nos. 1 to 3.

M.S. K. Sastri, S. P. Nayar for R. H. Dhebar, for respondent No. 7.

The Judgment of the Court was delivered by Shah, J. Respondents 1 to 4 and respondent No. 6 are the trustees of a public trust, styled "Shri Tricumraiji". In March 1950 the trustees mortgaged a house belonging to the trust to one Saheba to secure repayment of Rs. 5,000. An action instituted by the mortgagee against the trustees to enforce the mortgage was compromised, and it was decreed that the trustees do pay Rs. 3,910 due under the mortgage by monthly instalments of Rs. 100 each and in default of three instalments the entire amount remaining unpaid shall become due and recoverable from the mortgagee property. The trustees did not pay the instalments due under the decree, and in an application for execution by the mortgage(the mortgaged property was put up for sale and the bid of the appellant was accepted for Rs. 5,000 by the executing Court. The, trustees thereafter applied under 0. 21 r. 89 of the Code of Civil Procedure for setting aside the sale and deposited Rs. 250 being 5 % of the purchase-money for payment to the appellant and Rs. 6 for payment to the mortgagee, claiming that in consideration o the latter amount the mortgagee had agreed to "give to them six months' for payment of the mortgage amount", and had agree, in the meantime to abandon the application for execution. The Subordinate Judge passed an order disposing of the execution application and directed that Rs. 250 out of the amount deposit, by the trustees be paid over to the appellant. In appeal against that order by the appellant, the District Court reversed the order holding that since the trustees bad failed to comply with the requirements of r. 89 of 0. 21 Code of Civil Procedure, the executing Court had no jurisdiction to set aside the sale. The High Court of Gujarat in exercise of powers under s.115 of the Code of Civil Procedure set aside the order of the District Court. Raju, J.., held that sale of the mortgaged property which belonged to a public trust. without the sanction of the Charity Commissioner being prohibited by s. 36 of the Bombay Public Trusts Act, was invalid, and on that view remanded the case to the District Court "for decision on all the points correctly arising out of the matter". Against that order, this appeal has been preferred with special leave.

The mortgaged property belongs to a public trust within the meaning of the Bombay Public Trusts Act. Section 36 of the Bombay Public Trusts Act reads as follows:

> "Notwithstanding anything contained in the instrument of trust-
>
> (a) no sale, mortgage, exchange or gift of any immovable property, and
>
> (b) no lease for a period exceeding ten years in the case of agricultural land or for a period exceeding three years in the case of non-agricultural land or a building,

> belonging to a public trust, shall be valid without the previous sanction of the Charity Commissioner."

Raju, J., was of the opinion that the expression 'sale' in s. 36(a) includes a sale of the property of a public trust in execution of a decree of a civil Court for recovery of a debt due by the trust, and on that account a sale in execution of a decree held without the previous sanction of the Charity Commissioner must be deemed invalid. We are unable to agree with that view. Obviously the transactions of mortgage, exchange or gift or lease of any immovable property in cls. (a) & (b) contemplated to be made by the trustees are voluntary transactions, and in the absence of any clear provision in the Act, the expression "sale" in cl. (a) would only mean transfer of property by the trustees for a price. Section 36 occurs in Ch. V relating to 'Accounts and Audit', and is one of the provisions which imposes restrictions on the powers of the trustees. There is nothing to indicate, either in the words of the section, or in the context in which it occurs, that the sale prohibited without sanction of the Charity Commissioner includes a Court sale in execution of a decree. For the purpose of the present case. we do not deem it necessary to express any opinion on the question whether a sale in exercise of authority derived from the trustees, e.g. a covenant for sale under an English mortgage executed by the trustees or a sale in terms of a consent decree attracts the application. of s. 36 of the Act. We have no doubt, however, that the Legislature did not intend to put any restriction upon the power of the Civil Court executing a decree for recovery of money due from the trust, by sale of the property of the trust. The section imposes a fetter upon the power of the trustees: it is not intended thereby to confer upon the Charity Commissioner an overriding authority upon actions of the Civil Court in execution of decrees.

The learned Judge also held that s. 56B of the Bombay Public Trusts Act which provides that "in any suit or legal proceedings in which it appears to the Court that any question affecting a public religious or charitable purpose is involved, the Court shall not proceed to determine such question until after notice "has been given to the Charity Commissioner", made it obligatory upon the Court to issue notice to the Charity Commissioner, and if that officer desires to be joined as a party, to implied him in a proceeding to enforce a mortgage by sale of the mortgaged property. In our judgment, that view also cannot be sustained. A suit to enforce a mortgage or a proceeding to enforce a mortgage decree against property belonging to a public trust is not a suit or proceeding in which a question affecting a public religious or charitable purpose is involved.

The District Court was, in our judgment, right in holding that the requirements of 0. 21 r. 89 of the Code of Civil Procedure were not complied with and the Subordinate, Judge had no power to set aside the sale held in execution of the decree. Order 21 r. 89 of the Code of Civil Procedure which in terms applies to sale of immovable property in "execution of a decree" which expression includes execution of a decree for sale of mortgaged property, enables any person either owning such property or holding an interest therein by virtue of a title to apply to have the sale Set aside on his depositing in Court,-

> (a) for payment to the purchaser, a sum equal to five per cent. of the purchase-money, and

> (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

Rule 89 requires that two primary conditions relating to deposit must be fulfilled: the applicant must deposit in the Court for payment to the auction purchaser 5 % of the purchase-money: he must also deposit the amount specified in the proclamation of sale less any amount received by the decree-holder since the date of proclamation of sale for payment to the decree-holder. In the present case, the trustees of the trust had deposited Rs. 250 for payment to the auction purchaser. They also deposited Rs. 63 for payment to the decree-holder, but it is common ground that the claim of the mortgagee was not satisfied, by that deposit. The first condition was, therefore, fulfilled, but the second condition of 0 .21 r. 89 was not fulfilled.

It was urged, however, that the mortgagee having agreed to, abandon the execution proceeding and to wait for six months for receiving payment of the mortgage dues from the trustees, abandonment of the execution proceeding was in law equivalent to, payment to the decree-holder of the amount specified in the proclamation of sale for the recovery of which the sale was ordered. This in our Judgment is a futile argument. By abandoning the execution proceeding the claim of the creditor is not extinguished: he is entitled to commence fresh proceedings for sale of the property. Rule 89 of 0. 21 is intended to confer a right upon the judgment- debtor, even after the property is sold, to satisfy the claim of the decree-holder and to compensate the auction purchaser by paying him 5 % of the purchase-money. The provision, is not intended to defeat the claim of the auction purchaser, unless the decree is simultaneously satisfied. When the judgment creditor agrees to extend the time for payment of the amount for a specified period and in the meanwhile agrees to receive interest accruing due on the amount of the decree, the condition requiring the judgment debtor to deposit in Court for payment to the decreeholder the amount specified in the proclamation of sale for the recovery of which the sale was ordered. cannot be deemed to be complied with.

Our attention was invited to several decisions in which it was held, that if the judgment-debtor instead of depositing in Court the amount specified in the proclamation of sale for recovery of which the property is sold, satisfies the claim of the decree-holder under the decree, the requirements of 0. 21 r. 89 are complied with: Subbayya v. Venkata Subba Reddi(1), Muthuvenkatapathy Reddy v. Kuppu Reddi and Others(2), Laxmansing Baliramsing v. Laxminarayan Deosthan(3). Rabindra Nath v. Harendra Kumar(4). M. H. Shivaji Rao v. Niranjanaiah and Ant-.(,"). These cases proceed upon interpretation of the expression 'less any amount which may since the date of such proclamation of sale, have been received" occurring in cl. (b) of r. 89. It is unnecessary to venture an opinion whether these cases were correctly decided. It is sufficient to observe that an order setting aside a court sale, in execution of a mortgage decree cannot be obtained, under 0. 21 r. 89 of the Code of Civil Procedure by merely depositing 5 % of the purchase- money for payment to the auction purchaser and persuading the decree-holder to abandon the execution proceed-- (1) A.I.R.1935 Mad. 1050.

(2) A.I.R.1940 Mad. 427: I.L.R. [1940] Mad. 699. (3) I.L.R.[1947] Nag. 802.

(4) A.I.R.1956 Cal. 462.

(5) A.I.R.1962 Mys. 36.

Before parting with the case, it is necessary to deal with certain questions of fundamental importance in the administration of justice which the judgment of Raju, J., raises. The learned Judge observed-(I) that even though there is a judgment of a Single Judge of the High Court of which he is a member or of a Division Bench of that High Court, he is not bound to follow that precedent. because by following the precedent the Judge would act contrary to s. 165 of the Indian Evidence Act, and, would also violate the oath of office taken by him when entering upon his duties as a Judge under the Constitution; and (2) that a judgment of a Full Bench of the Court may be ignored by a Single Judge, if the Full Bench judgment is given on a reference made on a questionof law arising in a matter before a single .Judge or a DivisionBench. Such a judgment, according to Raju.J.. would "Dot be a judgment at all" and "has no existence in law".

The observations made by the learned Judge subvert the accepted notions about the force or precedents in our system of judicial administration. Precedents which enunciate rules of law form the foundation of administration of justice under our -system. It has been held time and again that a single Judge of ,,a High Court is ordinarily bound to accept as correct judgments of Courts of coordinate jurisdiction and of Division Benches and of the Full Benches of his Court and of this Court. The reason ,of the rule which makes a precedent binding lies in the desire to .secure uniformity and certainty in the law. We may refer to the observations made by Venkatarama Aiyar. J.. in Jaisri Sahu v. Rajdewan Dubey and Others(1) and the cases referred to therein. If decisions of the same or a superior Court are ignored, eventhough directly applicable. by a Judge in deciding a case arising before him, on the view that every .Judge is entitled to take such view as he chooses of the question of law arising before him as Venkatarama Aiyar, J., observed, the "law will be bereft of all its utility if it should be thrown into a state of uncertainty by reason of conflicting decisions". The effect of a precedent of the Gujarat High Court fell to be considered indirectly in this case. Before Raju, J., it was urged -for the first time in the course of this litigation that in the absence .of the sanction of the Charity Commissioner the Court sale was invalid. Counsel for the auction purchaser contended that this question was not raised before the District Court and that Court ,cannot be said to have acted illegally or with material irregularity in not deciding the question. Counsel for the auction purchaser relied upon two decisions in support of that proposition: Pinjare Karimbhai v. Shukla Hariprasad(2) and Haridas v. Rataney(2) He urged that under the Bombay Reorganization Act, 1960, the (1) [1962] 2 S.C.R. 558 at pp. 567-569.

(2) 3 Guj. L.R. 529.

(3) 23 Bom. L.R. 802, jurisdiction of the Bombay High Court which originally extended over the territory now forming part of the State of Gujarat, ceased when a new High Court was set up in the State of Gujarat, but it was held by a Full Bench of the High Court of Gujarat in State of Gujarat v. Gordhandas(1) that the decision of the Bombay High Court will be regarded as binding since the Gujarat High Court had inherited the jurisdiction. power and authority in respect of the territory of Gujarat. When pressed with the observations made in the two cases cited at the Bar, Raju. J.. found

an easy way out. He observed that the judgment of the Full Bench of the Gujarat High Court had "no existence in law". for in the absence of a provision in' the Constitution and the Character Act of 1861, a Judge of a High Court had no Power to refer a case to a Full Bench for determination of a question of law arising before him. and a decision given on a reference "had no existence in law". The learned Judge also though that if a Judge or a Division Bench of a Court makes a reference on a question of law to a Full Bench for decision. it Would in effect be assuming the jurisdiction which is vested by the Charter of the Court in the Chief justice of the High Court. In so observing the learned Judge completely misconceived the nature of a reference made by a Judge or a Bench of Judges to a larger Bench. when it appears to a Single Judge or a Division Bench that there are conflicting decisions of the same Court. or there are decisions of other High Courts in India which are strongly persuasive and take a view different from the view which prevails in his or their High Court.. or that a question of law of importance arises in the trial of a case, the Judge or the Bench passes an order that the papers be placed before the Chief Justice of the High Court with a request to form a special or Full Bench to hear and dispose of the case or the questions raised in the case. For making such a request to the Chief Justice, no authority of the Constitution or of the Charter of the High Court is needed. and by making such a request a Judge does not assume to himself the powers of the Chief Justice. A Single Judge does not by himself refer the matter to the Full Bench: he only requests the Chief Justice to constitute a Full Bench for hearing the matter. Such a Bench is constituted by the Chief Justice. The Chief Justice of a Court may as a rule, out of deference to the views expressed by his colleague, refer the case: that does not mean. however, that the source of the authority is in the order of reference. Again it would be impossible to hold that a judgment delivered by a Full Bench of a High Court after due consideration of the points before it is liable to be regarded as irrelevant by Judges of that Court on the -round of some alleged irregularity in the constitution of the Full Bench The judgment of the Full Bench of the Gujarat High Court was binding upon Raju J., If the learned Judge was of the view (12) 3 Guj. L.R. 269.

that the decision of Bhagwati, J.. in Pijare Karimbhai's case(1) and of Nacleod, C. J.. in Haridas's case(2) did not Jay down the 'correct law or rule of practice, it was open to him to recommend ,to the Chief Justice that the question be considered by a larger Bench. Judicial decorum, propriety and discipline required that lie should not ignore it. Our system of administration of justice aims at certainty in the law and that can be achieved only if, Judges do not ignore decisions by Courts of coordinate authority or of superior authority. Gajendragadkar, C. J.. observed In Lala Shri Bhagwan & Anr. v. Shri Ram Chand and Anr. (3).

> "It is hardly necessary to emphasise that consideration of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need ,to be re-considered, he should not embark upon that enquiry sitting as a single Judge, but should refer the matter 'to a Division Bench. or, in a proper case, place the relevant papers before the Chief Justice to enable him to -constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety."

In considering whether a precedent of a Court of coordinate ,authority is binding reference to s. 165 of the Evidence Act is irrelevant. Undoubtedly, every judgment must be based upon facts declarded by the Evidence Act to be relevant and duly proved. But when a Judge in deciding a case follows a precedent, he only regards himself bound by the principle underlying the judgMent and not by the facts of that case.

It is true that every Judge of a High Court before he enters upon his office takes an oath of office that he will bear true faith -and allegiance to the Constitution of India as by law established and that he will duly and faithfully and to the best of his ability, knowledge and judgment perform the duties of office without fear ,or favour, affection or illwill and that he will uphold the Constitution and the laws: but there is nothing in the oath of office which warrants a Judge in ignoring the rule relating to the binding nature, of the precedents which is uniformly followed.

The appeal is allowed and the order passed by the High Court set aside and the order passed by the District Court restored.

In the circumstances, there will be no order as to costs in this -Court and in the High Court.

Y.P.

Appeal allowed.

(1) 3 Guj. L.R. 529.

(2) 23 Bom. L. R. 802.

(3) [1965] 3 S.C.R. 218.