(1988) 11 AP CK 0008

In the Andhra Pradesh High Court

Case No : C.R.P. No. 3002 of 1987

Baratam Satyanarayana APPELLANT

Vs

Baratam Kantharao and Others RESPONDENT

Date of Decision : 29-11-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 83, Order 21 Rule 84, Order 21 Rule 85, Order 21 Rule 9, Order 32 Rule 12
Partition Act, 1893 — Section 2, 3, 3(2), 4, 4(2)
Partition Rules, 1893 — Rule 193, 194, 196, 197, 198

Citation : AIR 1989 AP 320

Hon'ble Judges : Jagannadha Rao, J

Bench : Single Bench

Advocate : C. Poornaiah, for the Appellant; M.S.K. Sastry, for the Respondent

Final Decision : Allowed

Judgement

Jagannadha Rao, J.—This revision petition raises a question of interpretation of the provisions of Sections 2, 3, 6(2), 7(b) of the Partition Act read with Rule 9(1) of the Rules framed under that Act and the applicability or otherwise of Order 21, Rules 84 and 85 of the CPC and of Rules 193 to 205 of the Civil Rules of Practice. The point is whether upon a sale among co-sharers of joint property u/s 3 of the Partition Act (hereinafter called the Act), failure to deposit the bid amount would automatically require the property to be resold by invoking Order 21, Rule 84, C.P.C. or whether the Court could extend time without reference to the provisions of Order 21, Rule 84, C.P.C.

2. The facts of the case are as follows : - The petitioner in this revision is the 2nd defendant in the suit which was originally filed in the year 1974 and was subsequently numbered as O.S. No. 20/78 on the file of Sub Court, Srikakulam. After passing of the preliminary decree the petitioner 2nd defendant filed LA. No. 378/78 for passing of a final decree. The Commissioner submitted his report on 11-6-1979 stating that inasmuch as the parties did not agree for division, the

provisions of the Partition Act are to be applied and he valued the items at a particular , valuation. It appears that the auction was held on 10-11-1981 between the co-sharers in the presence of the Court in respect of items 1, 12, 13 of the plaint B.

3. As the Court allowed a sale between the co-sharers, the case falls u/s 3 of the Partition Act and not u/s 2. As each of the co-sharer agreed to purchase a specific item, and all of them so agreed, no objection was taken nor can be raised about the procedure adopted for the sale in 1981.

4. It is not in dispute that a memo was ; filed into Court on 10-11-1981 stating that the four items were auctioned and that item No. 1 of B schedule was ultimately purchased by the 2nd defendant-petitioner for Rs. 55,000.00 items 12, 13 and 14 by the plaintiffs for Rs. 19,000/-, Rs. 5,000/- and Rs. 2,000/- respectively. The signatures of the parties were also taken in that memo. In the docket order dt. 10-11-1981 it is stated that the above items were put to auction ''in between the parties'' and that the matter is posted for drawing of lots. There was no direction either for deposit of the l/4th of the bid amount i immediately or granting time for payment of the 3/4th amount at any time subsequently. The fact remains that neither the petitioner 2nd defendant nor the plaintiffs deposited any amount either immediatedly nor subsequently. Thereafter, the plaintiffs have made several attempts to wriggle out of the auction as perhaps they felt that the petitioner 2nd defendant had gained an advantage in purchasing item No. 1 for Rs. 55,000/- only. The plaintiffs filed I.A. No. 478/81 u/s 151, C.P.C. for setting , aside the entire auction i.e., items 1, 12, 13 and 14 on the ground that the 1st plaintiff had acted in the auction without the consent of the other plaintiffs and that the auction did not take into account the right of the 9th plaintiff, the mother, in respect of a right of residence. The affidavit in that LA. was got filed by the 2nd plaintiff. The plaintiffs also filed LA. 340/82 under Order 32, RULE 12, C.P.C. with an affidavit of the 4th plaintiff saying that at the time of auction the plaintiffs 4 to 8 were minors and that they were not property. represented by the 9th plaintiff and that the said 9th plaintiff was illiterate and her interests were adverse to the interests of the minors. It will be noticed that in neither of these | applications was any contention raised that j either there was no order for auction or that the provisions of Order 21, RULE 84, C.P.C. applied and that the non-deposit of the monies in the auction require a fresh auction. At that stage both I.As. 478/81 and 340/82 were dismissed ; by the lower Court by order dt. 20-9- The plaintiffs preferred only one CRP. i.e., C.R.P. No. 3788/82 against the orders in I.A.No. 478/81 but instead of raising the grounds mentioned in that LA. they raised grounds which were raised in the lower Court in I.A.No. 340/82. The petitioners therein obtained stay of confirmation of sale from this Court. The said revision petition came up before a learned single Judge of this Court and was dismissed on merits on 7-10-1985. After disposal of the said C.R.P. the trial Court again took up the final decree application viz., LA. No. 378/78 for further action.

It was at that juncture that for the first time the plaintiffs raised a new objection viz., that the provisions of Order 21, Rule 84, C.P.C. regarding deposit were not complied with by the 2nd defendant-petitioner and that therefore items 1, 12, 13 and 14 have to be resold. The petitioner-2nd defendant then filed LA. No. 285/87 for apportioning the sale amount of items 1, 12, 13 and 14 of the B schedule among the sharers in proportion to their shares and adjusting the said shares of the auction purchasers in the sale amount in their respective bid amount and to ascertain the balance amount which the petitioner and the respondents-plaintiffs have to deposit in Court and for giving further directions for deposit of the said amount and for confirmation of sale. The said application filed by the petitioner was dismissed by the lower Court on 12-10-1987 stating that inasmuch as there was failure to deposit the bid amount under Order 21, Rule 84, C.P.C. the properties had to be re-sold. While so holding, the lower Court further observed that there I did not appear to be any orders passed by the lower Court earlier at the time of sale either directing the parties to deposit 25% of the bid amount or granting time to deposit the balance of the bid amount. It is against this order that the 2nd defendant has preferred this revision petition.

5. The plea of the respondents counsel Sri M.S.K. Sastry that there was no order for sale passed u/s 3 of the Partition Act and that the respondents were deprived of a right of appeal u/s 8 of the Partition Act read with Section 96, C.P.C. has no substance. When the respondents themselves filed the earlier I.As. for setting aside the sale and were unsuccessful in the C.R.P., they cannot now contend that there was no order for sale. The said plea is clearly barred by constructive res judicata, as contended by Sri V.L.N.G.K. Murthy for the petitioner.

I shall now deal with the main argument of the respondents that non-deposit as per Order 21, Rule 84, C.P.C. requires a re-sale.

6. It is true that in the case of public auction conducted under the provisions of the Code of Civil Procedure, the conditions for deposit of the auction amount are absolute and the statute itself provides for re-sale on default. It is stated in Sub-clause (1) of Order 21, Rule 84, C.P.C. that in every sale of Immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of 25% on the amount of his purchase money to the officer or other person conducting the sale and in default of such deposit the property shall forthwith be re-sold. Order 21, RULE 85, C.P.C. states that the full amount of purchase money payable shall be paid by the purchaser into Court before the Court closes on the 15th day from the sale of the property.

7. But the Partition Act, 1893 provides in Section 2 for sale of joint property by public auction and in Section 3 for auction in favour of the co-sharer or co-sharers so applying and as I shall presently show, these two types of sales are different. These two types of sale are not also exhaustive.

8. It would appear from the Statement of Objects and Reasons for the enactment of the Partition Act that, as the law stood, the Court was bound to give a share to

each of the parties and could not direct a sale or division of the proceeds. There could be instances where there were insuperable practical difficulties in the way of making an equal division and the Court was either powerless to give effect to its decree or was driven to all kinds of shifts and expedients in order to do so. The Court was, therefore, given a discretionary authority (under Section 2) to direct a sale where a partition could not reasonably be made and where the sale would, in the opinion of the Court, be more beneficial to the parties. But having regard to the strong attachment of the people in this country to their landed possessions, the consent of the parties interested at least to the extent of a moiety (i.e., one half) in the property was made a condition precedent to the exercise by the Court of the new power. At the same time, in order to prevent any oppressive exercise of this privilege, those shareholders who did not desire a sale were given a right 5 (under Section 3) to buy the others out at a valuation to be determined by the Court. If after the Court is requested u/s 2 to direct a sale, any other shareholder applies u/s 3 for leave to buy the share or shares of the parties asking for a sale, ''it has been made obligatory'', that the Court .shall order a valuation and offer to sell the same to such shareholder applying u/s 3, at a price to be ascertained by the Court. The Court has ''no option'' but to make such an offer. The purpose here is to prevent the property falling into hands of third parties R. Ramamurthi Iyer Vs. Raja V. Rajeswara Rao, . No doubt, apart from cases where those holding more thanamoiety (half share) apply u/s 2 or where some shareholders seek to buy u/s 3, there is a residuary power in the Court, in deserving cases, to exercise its inherent power to direct a sale as held by the Supreme Court in Badri Narain Prasad Choudhary and Others Vs. Nil Ratan Sarkar, approving the decision of our High Court in Rama Prasada Rao v. Subbaramaiah, AIR 1958 Andh Pra 647.

9. if thus there is difference between the sales u/s 2 as opposed to those u/s 3, the question then is regarding the procedure to be followed for conducting the sale.

10. It will be noticed that a sale u/s 2 and Sections 6, 7 of the Act go together. It is provided in Section 6(1) that every sale u/s 2 shall be subject to a reserved bidding and the amount of such bidding shall be fixed by the Court in such manner as it may think fit and may be varied from time to time. u/s 6(2), on any such sale, any of the shareholders shall be at liberty to bid at the sale on such terms as to non-payment of depositor as to setting off or accounting for the purchase money or any part thereof instead of paying the same as to the Court may deem reasonable. Section 6(3) is also incidental. Section 7 refers to ''procedure to be followed in case of sales'' and states that ''save as hereinbefore provided'', when property is directed to be sold under the act, the following procedure shall, as far as practicable, be adopted, namely (a) by the original side rules in cases of sales by the High Courts of Calcutta, Madras and Bombay or in other cases, u/s 7(b) by applying :

"such procedure as the High Court may, from time to lime by rules prescribed in this behalf, and until such rules arc made, the procedure prescribed by the Civil P.C. in respect of sales in execution of decrees."

11. Now rules have been made for purposes of sales under the Partition Act (vide pages 377 to 379 Law of Civil Procedure by Sri T. Ananta Babu, 2nd Ed), and Rule 9 of these rules makes reference to Rules 193 to 205 of the Civil Rules of Practice (except RULE 199), as far as the same are applicable''.

12. If the procedure under the C.P.C. and the above rules are applicable to sales u/s 2 by public auction, there is no doubt that in case of non-deposit of 25% of the purchase money, the property has to be ''resold'' under 0.21, Rule 84, C.P.C. The question however is whether this provision in Order 21, Rule 84, C.P.C. is also applicable to sales u/s 3 of this Act made in favour of the shareholder applying under that section, as in the present case before me.

13. It will be noticed that Section 2 refers to sale of the entire ''property'' and so does Section 6 which expressly refers to Section 2. It is true that Section 7 dealing with procedure does not refer to Section 2 expressly but it is clear that it refers only to sales u/s 2. This is clear from the opening words of Section 7, which use the word ''save as hereinbefore provided''. u/s 3. an application is filed thereunder in a proceeding for sale of property u/s 2 and the co-sharer who makes the application u/s 3 offers to buy the ''shares'' of the others and there is also no question of his having to buy his own share. He need not buy what he already owns. Section 3 is a self-contained provision and itself speaks of the method of valuation of the shares of others and the sale of those shares. In fact Section 4(2) refers to Section 3(2) and describes it as a provision containing that "procedure" for sale. It is therefore clear that Section 7 does not apply to sales u/s 3 and also u/s 4. Therefore the provisions of Order 21, Rule 84, C.P.C. which apply to sales u/s 2, cannot apply to sales u/s 3 and also u/s 4.

14. In case of sales u/s 3 and Section 4, the sale of the shares of other shareholders in favour of the shareholder applying for! purchase, is governed by the self-contained: procedure in Section 3 and Section 4 only and by such, ''necessary or proper directions'' as the Court may grant and not by the procedure in Section 7 i.e., the original side Rules of the High Court or the procedure in Order 21, C.P.C. or Rule 9 of the Rules made under the Partition Act of Rules 193 to 205 of the Civil Rules of Practice A view similar to the one taken by me has also been taken by the The Official Receiver, Salem Vs. C.B. Samanthagam Ammal and Others, where also the question was regarding the applicability of Order 21, Rule 84 C.P.C. to sales u/s 3 of the Act. The learned Judge held that even though the time for deposit of purchase money expired, the Court could extend time and that there was no need to conduct a resale straightway unde Order 21, Rule 84, C.P.C The learned Judge referred to Debendranath v. Haridas, (1911 15 Cal WN 552 and to Hari Charan v. Fakir Chandre, (1936) 40 Cal WN 955 and other cases where it has been held that the sale u/s 3 is not akin to a sale by public auction as provided in Section 2.

15. The decision in Unnimadhavan v. Pallikaramma 1980 Ker LT 892 also dealt with the question of extension of time for paying the balance money and it was argued that Order 21, Rules 84 and 85 required a re-sale. On facts it was treated as a case of sale u/s 2 but still it was held that the Court had power of extension of time under Rule 234 of the Civil Rules of Practice (Kerala) and that Rule 235 does not apply. It is not necessary for me to rely on that case which was a case u/s 2 of the Act and which turned upon the special rules applicable in Kerala.

16. I, therefore, hold that the lower Court erred in invoking Order 21, Rules 84 and 85, C.P.C. and dismissing the petition I. No. 285/87 filed by the petitioner-2nd defendant. It was also not open to the Court to hold that there was no order for sale or sale or directions for deposit of 25% when the respondents accepted earlier that there was an order for sale and in fact unsuccessfully filed applications and C.R.Ps. for setting aside the sale.

17. As the sale is referable to Section 3 of the Act, it will be open to the petitioner to deduct or set-off the value of his own share inasmuch as there is no question of his purchasing his own share. As already stated, inasmuch as the sale was by the consent-memo restricted to the shareholders, the sale must be treated as one u/s 3 only and was not a public auction u/s 2.

18. The Civil Revision Petition is accordingly allowed and the court is directed to give reasonable time to the petitioner for depositing the amount towards the sale of the shares of the other shareholders. Similarly time will be granted in respect of items 12 to 14 to the other co-sharer purchasers. The C.R.P. is allowed. No costs.