
(1964) 06 CAL CK 0019
In the Calcutta High Court
Case No : Civil Reven. No. 315 of 1962

Brahmananda Sharma

APPELLANT

Vs

Gajapati Nath Dey and Others

RESPONDENT

Date of Decision : 19-06-1964

Acts Referred:

Bengal Public Demands Recovery Act, 1913 — Section 27, 53, 7, 8
Constitution of India, 1950 — Article 227
Presidency Towns Insolvency Act, 1909 — Section 17

Citation : AIR 1965 Cal 492 : 69 CWN 7 : (1965) 58 ITR 579

Hon'ble Judges : D. Basu, J;B.N. Banerjee, J

Bench : Division Bench

Advocate : Jyotish Chandra Pal and Rathindra Kumar De, for the Appellant; J.K. Sen Gupta, Asoke Kumar Sen Gupta and Balai Lal Pal, for the Respondent

Final Decision : Allowed

Judgement

D. Basu, J.—This is an application under Article 227 of the Constitution, directed against an order of the Board of Revenue, dated 6-10-61 (at page 14 of the Application), by which the rejection of the Petitioner's application u/s 27 of the Bengal Public Demands Recovery Act. 1913 was affirmed by the Hoard, in exercise of its revisional power u/s 53 of the Act.

2. No affidavit in opposition has been filed by any of the Opposite Parties other than Opposite Party No. 3, the Union of India. Since the counter-affidavit of the Union of India does not controvert any of the material allegations of fact in the Application, the facts as stated in the Application may be taken as undisputed, and these are as follows:

FOR details of payment of Income Tax, two certificates under the Bengal Public Demands Recovery Act thereafter referred to as the Act") were filed before the Certificate Officer, 24-Parganas, against Opposite Party No. 2, Taraknath (hereinafter referred to as the Certificate-debtor), being Nos. 1402 I.T and 1857 I.T. of 1949-50. Notices u/s 7 of the Act were thereupon served upon the

Certificate-debtor on 6-4-50 and 6-5-50, respectively, but, nevertheless, he created a tenancy in respect of the disputed premises, which are situated in the district of 24 Parganas where the certificates were filed, in favour of Gajapati, Opposite Party No. 2, on 16-8-55, i.e., subsequently to the date of service of the notices u/s 7 of the Act. Thereafter, on 10-12-55, the Certificate-debtor sold his superior interest to Gayatri Debi. Opposite Party No. 4, who however, allowed Gajapati to remain in possession of the disputed premises as her tenant. To complete the picture, the Certificate-debtor was adjudicated an insolvent on 17-1-56.

3. In execution of the certificates aforesaid, the disputed properties were auction-sold and were purchased by the Petitioner on 7 7-58. That sale was confirmed on 29-9-68, but when the Petitioner-auction-purchaser went to take delivery of possession under a writ issued by the Certificate Officer on January 19, 1959, he was resisted by Gajapati.

4. The Petitioner, accordingly, made an application u/s 27 of the Act for being put into possession. In that proceeding, registered as Case No. 4 of 1958-59, Gajapati preferred an objection mainly on two grounds, viz.,--

(a) that he was entitled to remain in possession as tenant under Gayatri Devi (Opposite Party No. 4) who had purchased the interest of his lessor, the Certificate-debtor, prior to the Certificate sale;

(b) that the Petitioner acquired no title by this auction-purchase since the interest of the Certificate-debtor had vested in the Official Assignee on 17-1-56, when the Certificate-debtor had been adjudicated insolvent so that nothing passed to the auction-purchaser at the subsequent sale held in the Certificate proceeding.

5. The Certificate Officer rejected the objection on both the grounds and allowed the application u/s 27 of the Act. The Additional District Magistrate, in revision, affirmed the order of the Certificate Officer, but it was reversed by the Commissioner, on both the grounds. The final revising authority, namely, the Board of Revenue, has affirmed the order of the Commissioner, on the first ground only.

6-7. The said order of the Board of Revenue has been challenged in the application before us, on the ground that the Board has ""acted in the exercise of his jurisdiction illegally and with material irregularity", in disregard of the provisions of Section 8 of the Act and of Rule 75 of the Rules framed thereunder.

8. Prima facie, the Petitioner is not entitled to any relief on the above ground as stated in paragraph 12 of the Application. The simple reason is, that though there is a certain amount of overlapping between the powers conferred by Section 116 of the CPC and Article 227 of the Constitution, and Article 227 of the Constitution has been held to confer a power of judicial superintendence in the nature of revision, none of the several decisions of the Supreme Court which

have interpreted Article 227 have gone to the length of holding that the scope of Article 227 is co-extensive with that of Section 115, so that under Article 227, the High Court would be entitled to interfere even on the ground mentioned in Clause (c) of Section 115 of Code, namely, that the inferior court has acted "in the exercise of its jurisdiction illegally or with material irregularity"

9. Of course, the ambit of the jurisdiction under Article 227 has been widened since the earliest cases in which the Supreme Court expressed its views on that Article. In the early case of *D.N. Banerji Vs. P.R. Mukherjee and Others*, , the provisions of both Articles 226 and 227 having been combined in the application, the observations made therein cannot be taken as a clear pronouncement as to the scope of Article 227 alone.

10. The first authoritative pronouncement on Article 227, which has been referred to in subsequent decisions is to be found in the case of *Waryam Singh and Another Vs. Amarnath and Another*, , where the Court, speaking through Das, J., as he then was said--

"This power of superintendence conferred by Article 227, is, as pointed out by Harries, C. J., in *Dalmia Jain Airways Ltd. Vs. Sukumar Mukherjee*, to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. As rightly pointed out by the Judicial Commissioner in the case before us the lower Courts in refusing to make an order for ejectment acted arbitrarily. The lower Courts realised the legal position but in effect declined to do what was by Section 13(2) (i) incumbent on them to do and thereby refused to exercise jurisdiction vested in them by law. It was, therefore, a case which called for an interference by the Court of the Judicial Commissioner and it acted quite properly in doing so."

11. It was thus held in this case--

(a) That the power under Article 227 could not be used to correct a mere error of decision, whether of fact or of law.

(b) That the scope of interference under Article 227 was confined to cases of defect of jurisdiction, i.e.,

(i) of want or excess of jurisdiction; or

(ii) of refusal to exercise jurisdiction.

12. The instant case offered an instance of interference on the ground of refusal to exercise jurisdiction. The Rent Controller had refused to make an order for ejectment, even though it was incumbent upon him to make such order, u/s 13(2) (i) of the East Punjab Rent Restriction Act, 1949, where the fact of rent being in arrears was admitted. The District Judge dismissed the appeal preferred against the aforesaid order of the Rent Controller. The Judicial Commissioner of Himachal Pradesh, in exercise of his powers under Article 227, quashed the

orders of the District Judge and the Rent Controller and allowed the application for ejectment. The Supreme Court, on appeal, held that the power under Article 227 had been rightly exercised by the Judicial Commissioner, for, the lower Courts had "refused to exercise jurisdiction vested in them by law".

13. The next case to which we should refer in the present context, is that of Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, . The observations made by the Supreme Court in this case have to be analysed carefully, since in this case too, both Articles 226 and 227 were relied upon in the application before the High Court and both Articles were accordingly, referred to in the judgment of the Supreme Court, on appeal. As regards Article 226, the Court held that while the earlier view in England, relating to the prerogative writ of certiorari was that it was restricted to jurisdictional grounds only, in recent cases, it had been established that the writ could be utilised to correct errors apparent on the face of the record, which meant errors of law, such as were patent on the face of the record of the inferior Tribunal, and would not include--

(i) an error of fact, however, patent on the face of the record: or

(ii) an error of law which was not "apparent on the face of the record" (pp. 412-3, *ibid*).

14. As regards Article 227, however, the view expressed was that it was restricted to interference on the ground of defects of jurisdiction and would not go to correct any mistake even though apparent on the face of the record. Thus observed Sinha J. (as he then was), speaking for the Court--

"Under Article 226, the power of interference may extend to quashing an impugned order on the ground of a mistake apparent on the face of the record. But under Article 227, the power of Interference is limited to seeing that the tribunal functions within the limits of the authority."

15. It would seem from the above, that the Court was of the opinion that the power under Article 227 could not be exercised to interfere in cases of mistake of law apparent on the face of the record of the inferior tribunal, even though the High Court might interfere on the same ground under Article 226.

16. This stringent view, however, does not appear to have been maintained in later decisions. Thus, the observations in Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale, suggest that the High Court may, under Article 227, interfere to correct a mistake of law which is apparent on the face of the record. Das Gupta J., for the Court said--

Article 227 corresponds to Section 107 of the Government of India Act, 1915 However wide it may be than the provisions of Section 115 of the Code of Civil Procedure, it is well established that the High Court cannot in exercise under that Section (i.e.. Section 107 of the Government of India Act, 1915) assume appellate powers to correct every mistake of law. Here there is no

question of assumption of excessive jurisdiction or refusal to exercise jurisdiction or any irregularity or illegality in the procedure or any breach of any rule of natural justice. If anything it may merely be an erroneous decision which, the error not being apparent on face of the record, cannot be corrected by the High Court in revision u/s 115 of the CPC or under Article 227."

17. In the earlier case of Santosh Kumar Vs. Bhai Mool Singh, , it had been held that, under Article 227, the High Court might interfere even with a discretionary order of the inferior court or tribunal, under a procedural law, where the impugned order is violative of the principles of natural justice, e.g., where the defendant has a triable issue within the meaning of Sub-rule (1) of Rule 3 of Order 37 of the CPC and yet the Court saddles its leave to defend with such an onerous term under Sub-rule (2), that the leave granted becomes illusory, resulting in the refusal of hearing to the defendant, even where he has a legitimate defence.

18. The suggestion made in Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale, , that the power under Article 227 might be exercised to correct an error of law apparent on the face of the record appears to have been applied in The Provincial Transport Service Vs. State Industrial Court, . In this case, the High Court (Supreme Court?) set aside the order of the High Court refusing the application brought under Articles 226 and 227, on the following ground--

"The decision of the Assistant Labour Commissioner that no enquiry had been held by the management amounts.. . . . to a clear error in law. The Industrial Court erred in thinking that it was bound by this decision of the Labour Commissioner and this error on its part wasan error so apparent on the face of the record that it was proper and reasonable for the High Court to correct that error."

19. Of course, in this case, the application before the High Court had been labelled both under Articles 226 and 227, but the Supreme Court, in ordering "that the appellant's application under Articles 226 and 227 be allowed"", did not suggest that the ground of "error of law apparent on the face of the record" was available only under Article 226 and not under Article 227.

20. In Nibaran Chandra Bag etc. Vs. Mahendra Nath Ghughu, , on appeal from this Court, the Supreme Court has held that the High Court has no power, under Article 227, to interfere with a finding which is intra vires except where it is "perverse" in the sense that it is based on no material whatsoever.

21. Upon a reading of the Supreme Court decisions referred to above it would appear that--

(a) The power under Article 227 can be used to correct an error of law which is apparent on the face of the record.

(b) But this power cannot be used to correct a finding which is within jurisdiction

or to correct a mere illegal or irregular exercise of jurisdiction. Of course, the words "irregularity or illegality of procedure" were also used in *Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale*, , as we have seen, but these words cannot be understood in the sense in which it is used in Clause (c) of Section 115, simpliciter. Under Article 227, the High Court may interfere only where the irregularity in the procedure is so grave as to involve a breach of the principles of natural justice as in *Santosh Kumar Vs. Bhai Mool Singh*, or where it may amount to a refusal to exercise jurisdiction or the assumption of excessive jurisdiction.

22. It follows that the application before as cannot succeed on the ground as stated in paragraph 12 of the application, namely, that of illegal or irregular exercise of his jurisdiction by the Member, Board of Revenue. He had, undoubtedly, a revisional jurisdiction, u/s 53 of the Bengal Public Demands Recovery Act, and, in the exercise of this jurisdiction to refuse to interfere with the rejection of the petitioner's application u/s 27 of the Act. If, in doing so, he commits an error in the interpretation and application of the provisions of Section 8 of the Act or Rule 75 of the Rules framed under the Act, that may amount to a mere illegal exercise of the jurisdiction, or an erroneous decision on a point of law. It cannot be said that such illegality goes to the roof of his jurisdiction so as to render his order ultra vires or amounts to a refusal to exercise of jurisdiction.

23. We may, however, interfere if such error of law be apparent on the face of the record. In our opinion, the said error is, in fact, an error apparent on the face of the record. It would be useful, in this context, to advert to the provisions of Section 8 of the Act and Rule 75.

24. Section 8, Clause (a) of the Act is as follows:

"8. From and after the service of notice of any certificate u/s 7 upon a certificate-debtor--

(a) any private transfer or delivery of any of his immovable property situated in the district in which the certificate is filed, or of any interest in any such property, shall be void against any claim enforceable in execution of the certificate."

25. Rule 75 says--

"Where the immovable property sold is in the occupancy of the certificate-debtor, or of some person on his behalf, or of some person claiming under a title created by the certificate-debtor subsequently to the service of the notice issued u/s 7, and a certificate in respect thereof has been granted under Rule 74, the Certificate-officer shall, on the application of the purchaser, order delivery to be made by putting such purchaser, or any person whom he may appoint to receive delivery on his behalf, in possession of the property, and, if need be, by removing any person who refuses to vacate the same."

26. Rule 75 specifically lays down the duty of the Certificate-Officer when an application u/s 27 of the Act is presented to him. It is incumbent upon such

Officer to allow the application of the Certificate-purchaser and to put him in possession of the property auction-purchased by him by removing the person who may have resisted him in taking delivery of possession, if it is shown to him that--

(a) A certificate of purchase under Rule 74 has been granted to the applicant auction-purchaser;

(b) the property sold is in the occupation of either the certificate-debtor or of some person on his behalf or of some person claiming under a title created by the certificate-debtor subsequently to the service of the notice issued under Rule (S. ?) 7.

27. If we go through the order of the Certificate-Officer who had allowed the application of the petitioner u/s 27, it would appear that there was no dispute of fact on either of the two points. The petitioner was the certified auction-purchaser who had applied for delivery of possession and he was resisted by Gajapati. Before the Certificate-Officer, Gajapati urged that he was entitled to retain his possession on the ground, inter alia, that he had been settled as a tenant by the Certificate-debtor on 16-8-55. This date being obviously subsequent to the date or dates of service of notice u/s 7 of the Act, the Certificate-Officer rightly held that Gajapati had no right to resist the auction-purchaser, because he was in occupation of the property "under a title created by the certificate-debtor subsequently to the service of the notice issued under Rule 7." The foregoing facts not being disputed before the Board of Revenue, the Member was not entitled to come to a contrary decision in law. He held that Gajapati was not a person holding "on behalf of the certificate-debtor. He also held that the alternative clause "claiming under a title created by the certificate-debtor subsequently to the service of the notice u/s 7 was not applicable against Gajapati, but the reason given by the learned Member on this point is not clear at all. It seems that he supposed that the word "title" in Rule 75 referred to an absolute transfer such as a transfer of the superior interest by the Certificate-debtor to Gayatri Devi on 10-12-55, which the learned Member held to be void because it was a "title" created subsequently to the date of service of the notice u/s 7. But, in his opinion, the creation of a subordinate interest, i.e., a tenancy, in favour of Gajapati, did not constitute the creation of a "title" within the mischief of Rule 75. In this, he was clearly in error, because the word "title", in the present context, used without any qualifying words, comprises any legally enforceable right by which the person in occupation might have defended his possession, but for the fact that such right or interest was created after the statutory deadline, i.e., the date of service of notice u/s 7.

28. The error of the learned Member, Board of Revenue, is one of law, being a misconstruction of the mandatory provision in Rule 75, which is evident on the face of the record and to establish which no reference to evidence or the like is necessary. Without more, therefore, the impugned order cannot stand and this application must succeed.

29. Since the Board of Revenue refers only to Rule 75, a reference to Section 8 of the Act would not be necessary for a disposal of this application. But since the learned Advocate for the Petitioner has urged that the impugned order of the Board also contravenes Section 8 of the Act of the same set of undisputed facts, we may give, in brief, our views on this section. Section 8 declares of immovable property situated in the district where the certificate is filed void any "transfer" made by the certificate-debtor against any claim enforceable in execution of the certificate. The creation of a lease-hold or tenancy is a "transfer" within the meaning of the Transfer of Property Act and there is no reason to hold to the contrary for the purposes of the Public Demands Recovery Act. The creation of the tenancy in favour of Gajapati, after the service of notice u/s 7, was, accordingly, void, according to Section 8(a). At the hearing some doubts were entertained by us as to whether the claim of the auction-purchaser could be said to be a "claim enforceable in execution of the certificate", in view of the fact that u/s 20 of the Act only the interest of the certificate-debtor "at the time of the sale" vested in the auction-purchaser. We are, however, satisfied that there is no inconsistency between the two provisions and that the auction-purchaser, whether he is the certificate-holder himself or A third party, is entitled to claim the protection of Section 8 against an alienee from the certificate- debtor subsequent to the service of notice u/s 7.

30. On this point, we may refer to the general principle enunciated by the Judicial Committee in the case of *Dinendronath v. Ramkumar*, ILR 7 Cal. 107 (118) (PC), as to the rights of an auction-purchaser:

"There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. In the former, the price is fixed by the vendor and purchaser alone; in the latter, the sale must be made by Public auction conducted by a public officer, of which notice must be given as directed by the Act, and at which the public are entitled to bid. Under the former, the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter, the purchaser, notwithstanding he acquires merely the right, title, and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and freed from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution."

31. Though this observation was made under the general law of Civil Procedure, the principle laid down is applicable under the Public Demands Recovery Act as well, inasmuch as under this Act, the service of notice u/s 7 takes the place of an attachment in execution of a decree under the CPC and the prohibition in Section 8 of this Act is analogous to that in Section 64 of the Code. In the result, even though the auction-purchaser acquires only the right, title and interest that the certificate-debtor had at the time of the sale, and the title of the auction-purchaser is not generally valid against liabilities already created on the land by the certificate-debtor there is one exception, namely, that alienations made since

the date of service of notice u/s 7 are not valid and the auction purchaser takes the property free from such incumbrances. Of course, the words "claim in execution of the certificate" in Section 8(a) are somewhat dubious. But there is little doubt that these words would include the claim of the certificate-holder if he himself purchases at the auction-sale, because the sale is the mode by which the certificate is executed. On principle, it should also include a third party purchasing at that sale, because it cannot be the policy behind an auction-sale that the rights of a third party auction-purchaser should be inferior to those of a decree-holder qua auction-purchaser. If that were so, there would be no stranger bidder at the sale held in execution of a certificate under the Public Demands Recovery Act, and the power given to the certificate-holder to have the property put up for an auction-sale would be meaningless.

32. The impugned order is, accordingly, contrary to Section 8 of the Act, but our finding in connection with Rule 75 suffices to set aside the impugned order on the ground of "error apparent on the record."

33. Mr. Sen Gupta, on behalf of Gajapati, however, contends that the impugned order should be upheld on the other ground, which was relied upon by the Commissioner in dismissing the application u/s 27, but was not relied upon by the Board of Revenue in affirming the order of the Commissioner. That ground is that by reason of the certificate-debtor having been adjudged an insolvent, his property vested in the Official Assignee on 17-1-56, i.e., prior to the date of the certificate sale (7-7-58), so that by virtue of his auction-purchase, the Petitioner acquired nothing, in the view of Section 20 of the Public Demands Recovery Act. This contention of Mr. Sen Gupta is, however hardly tenable because it has been laid down by the Supreme Court in *Collector of Customs, Calcutta Vs. East India Commercial Co. Ltd.*, that the judgment or order of an inferior tribunal merges in that of the superior tribunal even where the judgment of the superior tribunal is one of affirmance. In the case before us, then, the only order which is outstanding is that of the Member, Board of Revenue. Though the learned Member affirmed the order of the Commissioner, he did so solely on the ground that the petitioner was not entitled to the benefit of Rule 75 and he refused to agree with the Commissioner on the ground relating to insolvency. In this state of affairs we are, in this proceeding under Article 227, called upon to see only whether the decision of the Member, Board of Revenue on the ground relating to Rule 75 of the Rules framed under the Public Demands Recovery Act is liable to be set aside.

34. On the merits also, the argument relating to insolvency is not sustainable. This question has been, in fact, decided by A.N. Ray J. in Insolvency Case No. 18 of 1956 where the Official Assignee claimed the property auction-purchased by the petitioner, but that claim was rejected. It is contended before us that that decision is not binding on Gajapati as he was not a party to that proceeding. Be that as it may, Clause (b) of Section 18, read with the Proviso to Section 17 of the Presidency Towns Insolvency Act, 1909, is a complete answer to the

contention on the present point. Clause (b) of Section 8 of the Bengal Public Demands Recovery Act says that from and after the service of notice u/s 7, "the amount due from time to time in respect of the certificate shall be a charge upon the immovable property of the certificate debtor, wherever situated, to which every other charge created subsequently to the service of the said notice shall be postponed."

35. The certificate-holder is thus made a secured creditor by the above provision. The proviso to Section 17 of the Presidency Towns Insolvency Act says that though the property of the insolvent wherever situate shall vest in the official assignee from the date of adjudication, it shall not affect the power of any secured creditor to realise his security. In this case, the charge of the certificate-holder by service of notice u/s 7 of the Bengal Public Demands Recovery Act was created prior to the date of adjudication. Consequently, the claim of the certificate-holder in execution of that charge or of the auction-purchaser at the sale held in execution of the certificate became paramount to that of the Official Assignee, and it cannot be contended that the petitioner has acquired nothing because the property of the certificate-debtor had vested in the Official Assignee prior to the date of the certificate sale.

36. In the result, we allow this application on the ground that the impugned order is vitiated by an error apparent on the face of the record. The Rule is, accordingly, made absolute but without any order as to costs.

Banerjee, J.

37. Without committing myself to the view that Article 227 of the Constitution cannot be invoked to correct illegality or irregularity in the exercise of jurisdiction, I agree with the order proposed by my Lord.