
(1951) 04 P&H CK 0006
In the Punjab And Haryana At Chandigarh
Case No : Ex. First Appeal No. 30 of 1950

Custodian, Evacuee Property, Delhi

APPELLANT

Vs

Ram Kishan and Others

RESPONDENT

Date of Decision : 27-04-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89
East Punjab Evacuees (Administration of Property) Act, 1947 — Section 8(2)

Citation : AIR 1952 P&H 141

Hon'ble Judges : Savinder Singh Sodhi, J; Harnam Singh, J

Bench : Division Bench

Advocate : Indar Dev Dua, for the Appellant; Bishan Narain and Tek Chand, for the Respondent

Final Decision : Allowed

Judgement

Harnam Singh, J.—On 30-1-1948, the Senior Subordinate Judge, Gurgaon, passed an "ex parte" decree in Civil Suit No. 443 of 1946 for a sum of Rs. 19,023/- with proportionate costs aggregating to Rs. 1,740/8/- against Khan Bahadur Sayed Nawab Ali and Sons, 8, Keeling Road, New Delhi. On 20-2-1948, the Court which passed the decree sent the decree to the District Judge at Delhi for execution. On 15-5-1948, the decree-holders sued out execution at Delhi and in execution proceedings bungalow No. 8, Keeling Road, New Delhi, was attached on 9-6-1948. On 19-6-1948, the decree-holders applied under Rule 66 of Order XXI, Civil P. C. that the proclamation of sale by public auction may be drawn up after notice to the judgment-debtor. In para 5 of that application the decree-holders stated that the Judgment-debtor had migrated to Pakistan. Notice was issued to the judgment-debtor under Rule 66 of Order XXI, Civil P. C. for 24-7-1948. The bailiff, however, reported on 29-6-1948, that the whereabouts of the judgment-debtor were not traceable.

2. On the application made by the decree-holders on 29-6-1948 the Court ordered that the judgment-debtor may be served by publication of notice in the

Civil and Military Gazette of Lahore and pursuant to that order the judgment-debtors were served by publication of notice in the issue of the Civil and Military Gazette for 18-8-1948. On 5-10-1948, notice was sent to the Custodian to file objections to the proposed sale, if any, on 16-10-1948, in the Court of the Senior Subordinate Judge at Delhi. This notice was served on the Custodian on 15-10-1948.

3. On 9-6-1948 when the attachment took place the East Punjab Evacuees" (Administration of Property) Act, 1947, hereinafter referred to as the Act, was in force in the Province of Delhi. u/s 4 of the Act the property in question vested in the Custodian. That being so, the property was not liable to attachment and sale. On this point Section 8 of the Act may be seen. Section 8 of the Act reads: "8. Exemption from attachment, distress or sale:

1. All property which vests in the Custodian shall be exempt from attachment, distress or sale in execution of the decree of a Civil or Revenue Court or in pursuance of the order of any other authority.

2. ALL subsisting attachments of evacuees" property effected after 13-9-1947, under orders of a Civil or Revenue Court or Officer or other authority shall cease to have any effect, and all sales, leases or other forms of alienation by any Court, officer or authority of such property effected after the above-mentioned date shall be liable to be set aside at the instance of the Custodian on an application filed before the Court, officer or authority which ordered the sale, lease or alienation, as the case may be, within three months of the coming into force of East Punjab Evacuees" (Administration of Property) (Second Amendment) Ordinance, 1948, or the date of the sale, lease or alienation, whichever is later." Notwithstanding the prohibition contained in Section 8 of the Act the property was put to sale and was sold in favour of L. Hira Lal on 17-11-1948, for Rs. 2,21,000/-.

4. On 18-12-1948, the Custodian applied for the setting aside of the sale u/s 8(2) of the Act. In that application the Custodian pleaded that the property sold by auction was evacuee property and was not liable to attachment and sale. "Lala" Hira Lal auction-purchaser resisted the application u/s 8(2) of the Act alleging that on 5-10-1948, notice was issued to the Custodian for objections. If any, on 16-10-1948, and that notice was served on the Custodian on 15-10-1948, but he failed to object to the proposed auction sale.

5. In deciding the objection petition the Court found that the property sold by auction vested in the Custodian and that the property was not liable to attachment and sale. That being so, the Court ordered the Custodian to deposit in Court Rs. 5650/- by 31-12-1948, on account of the commission payable to the auctioneer if the Custodian wanted to get the sale set aside. From the order passed by the executing Court on 12-11-1949, the Custodian has come to this Court in appeal.

6. Mr. Inder Dev Dua, learned counsel for the Custodian, urges that in the

circumstances of the case the Custodian was not liable to pay the commission of the auctioneer. The matter of commission payable on sales is dealt with in Chap. 12-L, Vol. 1 of the Rules and Orders of the High Court, the last edition of which was published in 1942. Rule 22 (i) reads:

"22(1) No commission shall be paid on the proceeds of sales set aside for & material irregularity in publishing or conducting the sale. The commission on the proceeds of a sale set aside for any other cause shall be paid by the person at whose instance and for whose benefit the sale is set aside and the Court Auctioneer shall be entitled to his share of such commission."

Indeed, in deciding execution case No. 84 of 1948 the executing Court has based itself on the provisions of Rule 22 cited above.

(7) In these proceedings it is not disputed that Rule 22, Chap. 12-L, "has not the force of law and is not absolutely binding on Courts subordinate to this Court". In the preface to Vol. I, Rules and Orders of the High Court, we find:

"Statutory rules made under different enactments as given in these volumes have the force of law; but as regards the other subject-matter it should be noted that these instructions have been issued by the High Court as the administrative Head of the Judicial Department, and so far as the general law or procedure are intended for the guidance of Subordinate Courts and should "ordinarily be followed". They are, however, not "absolutely binding", as far as the general law and procedure are concerned on them in the same sense as judicial decisions of the High Court published by authority....."

Clearly, the executing Court was in error in thinking that the instructions contained in Chap. 12-L, Rules and Orders of the High Court, Vol. 1, were binding on it.

8. The question still remains on whom should the burden of the payment of commission fall. On the facts stated above, it was the duty of the Court to see that evacuee property was not attached and sold. The fact that the judgment-debtor had migrated to Pakistan was brought to the notice of the Court by the decree-holder, on this point Sri Bam decree-holder put in his own affidavit and acting on that affidavit the executing Court ordered that the judgment-debtor may be served by publication of notice in the Civil and Military Gazette of Lahore.

9. From the record of the proceedings in the executing Court it is clear that the Custodian was served on 15-10-1948, for 1G-1G-1948. By reason of shortness of notice it was not possible for the Custodian to put in objections in the executing Court on 16-10-1948. It was, however, apparent on the face of the record that the property could not be attached and sold with the result that subsequent to the auction-sale the Custodian applied to the Court u/s 8(2) of the Act for the setting aside of the sale.

10. Considering that the property was put to auction by reason of a mistake on the part of the Court I find that it was a clear case for departure from the rule

contained in Rule 22 dealing with the matter of commissions payable on auction-sales. In deciding the point that has arisen in these proceedings I fully appreciate the force of the rule that where a practice has existed it is convenient, except in cases of extreme urgency and necessity, to adhere to it, "Cursus Curiae Est. Lex Curiae". Rule 22 is, however, not "absolutely binding" and as stated in the preface to Vol. I, Rules and Orders of the High Court "should ordinarily be followed". Clearly, Rule 22 admits of exceptions and the facts of the present case justify a departure from that rule of practice.

11. In the result, I would set aside the auction sale unconditionally and direct that no commission shall be paid to the Court auctioneer. In the circumstances of the case, I make no order as to costs in these proceedings.

Soni, J.

12. I agree.