

(1968) 09 OHC CK 0005

In the Orissa High Court

Case No : M.A. No. 208 of 1966 and C.R. No. 12 of 1967

Damodar Mohapatra

APPELLANT

Vs

Raghunath Pradhani and Others

RESPONDENT

Date of Decision : 12-09-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, Order 21 Rule 65, Order 21 Rule 89, Order 21 Rule 90, Order 21 Rule 90(1)
Orissa Money Lenders Act, 1939 — Section 11
Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulations, 1956 — Section 3

Citation : (1969) 35 CLT 139

Hon'ble Judges : G.K. Misra, J

Bench : Single Bench

Advocate : N.V. Ramdas, K.V. Sharma and N.B.K. Murty, for the Appellant; R.C. Misra, for the Respondent

Final Decision : Dismissed

Judgement

G.K. Misra, J.—The disputed property belonged to Syamsundar Naik (Respondent No. 2). His mother is Sombari Naikani (Respondent No. 3). Damodar Mohapatra (decree-holder) obtained a money decree against Syamsundar. In E.P. No. 170 of 1963 the decree-holder attached the disputed property on 13-7-1963. On 23-10-1963 judgment-debtor No. 1 got permission from the R.D.O., Nowrangpur, to sell the property to any non-hill man u/s 3 of the Orissa Regulation No. 2 of 1956. On 2-1-1964 Syamsundar judgment-debtor No. 1 sold the property to Raghunath Pradhani, Respondent No. 1, by a registered Bale deed Ext. 4. On 15-5-1964 the property was put to auction sale at the instance of the decree-holder. The same was purchased by Jagadish Chandra Mohapatra, son of the decree-holder. On 22-6-1964 Respondent No. 1 filed an application under Order 21, Rule 90, Section 47 and Section 151, CPC that the sale must be set aside as he had already purchased the property by a registered sale deed on 2-1-1964. The objection was accepted by both the Courts below and the sale was set aside.

Against confirming the order passed by the lower Appellate Court this miscellaneous Appeal and the civil revision have been filed by the decree-holder.

2. Mr. Ramdas raises two contentions-(1) that the judgment-debtor Syamsundar Naik to whom the property admittedly belonged was not a member of the scheduled tribe and therefore the attachment and sale were not void, and, (2) that judgment-debtor No. 1 having failed to take any objection to the attachment cannot take any objection to the sale on the principle of constructive res judicata. Both the contentions require careful examination.

3. Clause 2 of the Orissa Regulation No. 2 of 1958, the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation, 1956 (hereinafter referred to as the Regulation) defines "scheduled tribes" as specified in respect of the State of Orissa in the Constitution (Scheduled Tribes) Order, 1950 (hereinafter referred to as the order). In part IX of the schedule to the Order various scheduled tribes as prevalent in Orissa have been mentioned. There are 62 classes. judgment-debtor No. 1 admittedly belong to Bhotra caste. Bhotras do not find mention in the aforesaid 02 classes of scheduled tribes.

4. Clause 3(1) of the Regulation lays down that notwithstanding anything contained in any law for the time being in force any transfer of immovable property situated within a Scheduled Area by a member of a Scheduled Tribe shall be absolutely null and void and of no force or effect whatever unless made in favour of another member of a Scheduled Tribe or with the previous consent in writing of the competent authority. Admittedly the decree-holder and his son, the auction purchaser, are not members of the scheduled tribe.

Clause 6 of the Regulation says that in execution of a money decree against a member of a Scheduled Tribe, no right, title or interest held by him in any immovable property within any Scheduled Area shall be liable to be attached and sold except as and if prescribed.

5. It will thus be clear on a perusal of Clauses 3(I) and Clause 6 of the Regulation that the disputed property is not liable to attachment or sale without the permission of the competent authority if judgment-debtor No. 1 is a member of the Scheduled Tribe.

Before the Courts below the decree-holder accepted the position that judgment-debtor No. 1 was a member of the scheduled tribe. Mr. Ramdas also does not dispute that in various petitions filed by the decree-holder such a position was accepted. He however contends that if in fact judgment-debtor No. 1 was not a member of the scheduled tribe any wrong admission made by the decree-holder could not amount to estoppel in view of the constitutional provision. The contention, though ingenious, is bereft of substance. Paragraph 2 of the Order runs thus:

The Tribes or tribal communities, or Rarts of, or groups within, tribes or tribal communities, specified in parts I to XII of the Schedule to this Order shall, in

relation to the States to which those Parts respectively relate, be deemed to be Scheduled Tribes so far as regards members thereof resident in the localities specified in relation to them respectively in those parts of that Schedule.

It will thus be clear that the main 62 clauses of scheduled tribes in Orissa were enumerated in Part IX of the Order. By para. 2 it was made clear that 1? there are parts of groups within the tribes they would also be included within the scheduled tribes.

Whether a Bhotra comes within any of the sub-groups of scheduled tribes enumerated in Part IX is a pure question of fact. The decree-holder from the very start accepted the position that judgment-debtor No. 1 was a member of the scheduled tribe. If my objection had been raised that he was Dot a member of the scheduled tribe the purchaser from judgment-debtor No. 1 and judgment-debtor No. 1 could have pleaded and proved that they belonged to one of the sub-groups of the scheduled tribes. I accordingly do not find any substance in the contention of Mr. Ramdas that on a bare comparison of the various classes of scheduled tribes in Part IX of the Order the Court would come to Or conclusion that judgment-debtor No. 1 was not a member of the scheduled tribe. This contention is accordingly rejected.

6. It is next contended by Mr. Ramdas that the plea of the transferee that the auction sale in favour of a non-hillman is void is barred by the principle of constructive res judicata. To appreciate this contention it is necessary to state certain facts.

The execution proceeding was filed on 17-3-1963. Though initially a notice under Order 21, Rule 22, CPC was issued fixing 16-7-1963 for return, the notice was dispensed with by an order of the Court on 26.6.1963. As a result of that order notice under Order 21, Rule 22, CPC and the writ of attachment were issued together. The notice under Order 21, Rule 22, CPC was returned unserved. The writ of attachment was executed as would appear from the order dated. 6-7-1963. The judgment-debtor filed a petition for time to file objection. The petition was however not moved and was rejected. Despite the fact that attachment had already been effected, the decree-holder took further steps for attachment without taking steps for fixing the valuation of the land. On 23-7-1963 the lawyer for the decree-holder was heard and a notice u/s 11 of the Orissa Money Lenders Act was issued to the judgment-debtor. On 11-9-1963 the decree-holder filed processes for issue of sale proclamation. A petition under Order 21, Rule 65, CPC was filed on 18-9-1963. The order dated 21-9-1963 shows that the sale proclamation was returned duly served, and the case was fixed for 27-11-1963 for sale. On that date the nazis conducted the sale, but no bidders came forward. It would thus appear from the aforesaid statement of facts that though the judgment-debtor appeared in the case and various steps were taken for fixing the valuation and issue of sale proclamation, the judgment-debtor did not file any objection that the attached property was not saleable. Law is well settled that the principle of constructive res judicata applies to different

stages of the execution proceeding. In Jagannath Ramanuj Raj Deb Vs. Sri Lakshmi Narayan Tripathy and Others, this Court held that an objection that on 11-3-1964 the decree-holder took steps for issue of sale proclamation. The sale proclamation was duly proclaimed and was returned on 15-5-1964. The sale took place on 15-5-1964, the due date fixed in the sale proclamation, and the son of the decree-holder was the highest bidder for Rs. 3000/-.

Neither the judgment-debtor nor the transferee from him took objection to the issue of the sale proclamation fixing the date of the sale on the ground that the judgment-debtor had ceased to have an interest by virtue of the sale in favour of Respondent No. 1 on 2-1-1964 by the registered sale deed Ext. 4. Neither they took the objection that the permission Ext. 7 did not authorize the auction sale. This is the very objection Respondent No. 1 is taking after the sale has taken place. On the aforesaid authorities the objection is barred by the principle of constructive res judicata.

8. A reference to certain relevant provisions of the CPC would make the point clear. Under Order 21, Rule 89, CPC as amended in Orissa, where immovable property has been sold in execution of a decree the judgment-debtor or any person deriving title through the judgment-debtor or any person holding an interest in the property at the date of the application under this rule may apply to have the Bale Bet aside on depositing in Court as prescribed there under. It is not the case of Respondent No. 1 that any steps were taken under this rule. The objection after the sale that the judgment-debtor had no saleable interest which had already been transferred to Respondent No. 1 by Ext. 4 is no longer available and is barred by the principle of constructive res judicata.

A reference to Order 21, Rule 91, CPC would show that it is only the purchaser at any such sale in execution of a decree who may apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property. There is no corresponding provision conferring the same privilege either on the judgment-debtor or on the transferee from the judgment-debtor.

Under Order 21, Rule 92, Civil Procedure Code, where no application is made under Rule 89, 90 or 91 or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute.

Admittedly in this case there is no application under any one of the aforesaid rules.

9. On the aforesaid analysis it is clear that the judgment-debtor or the transferee from him did not file any objection that the judgment-debtor had no saleable interest or that the permission Ext. 7 did not authorize the sale. This very objection after the sale is barred by the principle of constructive res judicata. On this ground alone the auction purchaser's appeal is bound to succeed.

10. Mr. Misra then contended that sale without attachment is a material is

regularity under Order 21, Rule 90, Civil Procedure Code. Clause 3(1) of the Regulation lays down that such a property is not liable to attachment without the permission of the competent authority. Mr. Misra contends that the attachment was void, that there was no attachment in the eye of law, and that the sale without attachment amounts to a material irregularity in the publication or conduction of the sale. Doubtless the attachment is contrary to law as laid down in Clause 3(1) of the Regulation, but this objection is barred by constructive res judicata as the judgment-debtor or his transferee did not raise too objection at the appropriate stages and allowed other steps to be taken by the decree-holder in furtherance of the sale. The decree-holder also did not, by his application dated 27-11-1963, admit that the attachment was contrary to law as he admitted in the case of sale. So the right accrued to him under the attachment subsisted. There is therefore no basis for the contention of Mr. Misra that the sale was without attachment.

11. The next question for consideration is that assuming that there was no attachment in the eye of law whether it constitutes a material irregularity in the conduction or publication of the sale under Order 21, Rule 90, Civil Procedure Code. There is conflict of authority on this point, which need not be cited. One view is that, the attachment is a step antecedent to the publication or conduction of the sale. The opposite view is that the attachment is a step leading to publication of the sale. I am in favour of the former view. I am clearly of opinion that the absence of attachment is not a material irregularity in the publication or conduction of the sale within the meaning of Order 21, Rule 90, Civil Procedure Code.

12. Even assuming that the absence of attachment is a material irregularity, there is no proof that the Applicant sustained substantial injury by reason of non-attachment. In fact the Applicant did not take such a plea in the application itself.

13. Order 21, Rule 90, CPC was amended by the Patna High Court. The same amendment has been accepted in Orissa. The proviso to Sub-rule (1) has been amended thus:

(i) Provided that no application to set aside a sale shall be admitted,

(a) upon any ground which could have been, but was not put forward by the Applicant before the sale was concluded, and

(b) unless the Applicant deposits such amount not exceeding 12½ percent of the sum realised by the sale or such other security as the Court may in its discretion fix, unless the Court, for reasons to be recorded, dispenses with the deposit.

(ii) Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the Applicant has sustained substantial injury by reason of such irregularity or fraud.

Proviso (i) (a) is very clear that any ground which could have been put forward by the Applicant before the sale was concluded could not be permitted to be

taken in an application under Order 21, Rule 90, Civil Procedure Code. The objection to attachment in the manner presented by Mr. Misra could have been put forward prior to the conclusion of the sale. Consequently by visit of the Orissa amendment this objection is not entertainable.

14. Proviso (i)(b) is also a bar to the objection raised by Mr. Misra. Mr. Misra concedes that the conditions prescribed in this proviso has not been complied with. The Applicant has not deposited any amount or furnished any security or has not got an order from the Court to dispense with the deposit. On the other hand the matter was fully contested even before the executing Court. Both the executing Court and the Appellate Court overruled this objection on the, basis of the Full Bench decision in Brij Behari Lal Vs. Firm Srinivas Ram Kumar and Others, . This decision does not help Respondent No. 1. This was a case where deposit was not made along with the application nor within the prescribed period of 30 days, but subsequently made. This Lordships hold that where no deposit accompanies an application to set aside a sale the Court has no power to reject such application forthwith. On the other hand it must give the Applicant an opportunity to urge that the deposit should be dispensed with or to deposit the full or the lesser amount or other security before some date fixed for admission. If the orders of the Court Are complied with the application must be admitted and beard upon the merits provided that he complies and with the substituted proviso (i)(a). As has already been stated, this decision does not assist Respondent No. I. Once the objection was raised by the decree-holder Respondent No. 1 ought to have obtained an order in conformity with proviso (i) (b). On the contrary Respondent No. 1 took the stand that even if no deposit was made or security given or an order excusing deposit was made, the application was maintainable. The Full Bench decision does not support such a stand. Thus the application under Order 21, Rule 90, CPC is not maintainable on account of non-compliance with proviso (i) to Order 21, Rule 90, Civil Procedure Code.

15. The application filed by Respondent No. 1 to set aside the sale was filed under Sections 47, 151 and Order 21, Rule 90, Civil Procedure Code. Both the learned Counsel concede that Section 151 has no application to this case, The decree-holder has filed a Miscellaneous Appeal if the application is u/s 47 and a Civil Revision if it is under Order 21, Rule 90, Civil Procedure Code. The original application of Respondent No. 1 can be one u/s 47 and not under Order 21, Rule 90, Civil Procedure Code. The Appellant has filed an appeal and a revision by way of abundant collation. The Miscellaneous Appeal is allowed with costs throughout. The Civil Revision is dismissed without costs.