

(1973) 04 OHC CK 0037
In the Orissa High Court
Case No : Misc. Appeal No. 154 of 1971

Duri Venkata Suryanarayan Murty and Another	APPELLANT
Vs	
G. Venkata Ranga Rao and Another	RESPONDENT

Date of Decision : 26-04-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 21 Rule 91, 151, 47, 47(3)
Limitation Act, 1908 — Article 166, 181
Limitation Act, 1963 — Article 127, 137
Orissa Estates Abolition Act, 1951 — Section 7, 8A

Citation : (1973) 39 CLT 857

Hon'ble Judges : S.K. Ray, J

Bench : Single Bench

Advocate : P.V. Ramdas, for the Appellant; S.S. Basu and I.S.N. Murty, for the Respondent

Judgement

S.K. Ray, J.—This appeal is by the judgment-debtors, and arises out of the execution proceedings in E.P. No. 9/60 on the file of the Munsif, Berhampur. The third party-auction purchaser's application for setting aside the sale, held in execution of a money decree, having been allowed, an appeal from that order to the Subordinate Judge, Berhampur having failed, the present appeal has been filed.

2. Respondent No. 2 obtained a decree for money against the Appellants and put the same in execution in E.P. No. 9/60 in the Court of the Munsif, Berhampur. The disputed properties were sold in Court auction on 10-5-1966. Respondent No. 1 purchased the same for a sum of Rs. 7500/- and deposited the amount in Court. This sale was confirmed on 21-6-1966. Subsequently, he filed an application on 3-8-1966 for setting aside the sale on the grounds that irregularity and fraud were committed in publishing or conducting the sale and that the judgment-debtors had no saleable interest.

3. This application of the auction-purchaser (Respondent No. 1) was first of all

rejected by the Munsif on 30-9-1961 on the ground of limitation and that there was no fraud or irregularity in publishing or conducting the sale. The auction-purchaser appealed to the Subordinate Judge who upheld the order of rejection only on the ground that the application was barred by limitation. He reversed the finding of the executing Court that there was irregularity or fraud in conducting the sale. The auction-purchaser came to this Court in R.A. No. 74/68. It was held by this Court that the application of the auction-purchaser for setting aside the sale should be treated as one u/s 47, CPC and as such, the appeal to this Court was maintainable. It laid down the principle that where fraud has been practised and a Court in executing a decree, finds that fraud is proved to have been practised, the Court does not lack power to undo the consequences of fraud by relieving the party of the prejudicial effects resulting from the fraudulent act. It then remanded the whole matter to the executing Court for fresh disposal of the application of the auction-purchaser in accordance with law after taking relevant evidence.

4. After remand, both the Courts below have concurred in setting aside the sale. The concurrent findings of the Courts below are:

(a) The disputed lands were part of the enfranchised Dharmyadaya Inam lands and as such, constituted an Estates Abolition Act.

(b) The intermediary interest in the suit lands which was vested with the judgment-debtors was abolished by virtue of notification No. 64950-E.A.I. (SP) 109/65-R dated 30-9-1964 of the Revenue and Excise Department of the Government of Orissa. Consequently, the lands vested with the State Government free from all encumbrances.

(c) Lands were in possession of the tenants at the time of vesting and thus were not in Khas possession of the judgment debtors. That apart they did not even file any application for settlement of the land with him under the provisions of Section 7 of the Orissa Estates Abolition Act within the stipulated time. In consequence, the judgment debtors lost all interest in the disputed lands inclusive of right to possess and thus they had no saleable interest in the same on the date of sale.

(d) The perchas, issued in respect of the disputed lands in the name of the : judgment-debtors were prepared on 30-11-1970; such draft record-of-rights cannot create any title of the judgment-debtors in the disputed lands when they had none prior to its preparation.

(e) There was much irregularity in publishing and conducting the sale which amounted, in essence, to a fraud.

5. The first contention, urged by Mr. Ramdas, on behalf of the Appellants, is that the application of the auction-purchaser is not maintainable u/s 47 of the Code of Civil Procedure. This application was nomenclatured as one under Order 21, Rules 90 and 91 and Section 151, Code of Civil Procedure. If this application is,

in law, maintainable u/s 47 CPC mere omission to designate the correct section of law or designating erroneous provisions of law would not affect its maintainability. It is, therefore, to be seen whether the application of the auction-purchaser could be sustained u/s 47, Code of Civil Procedure. There are two aspects to this question, namely, (a) locus standi of the auction-purchaser to maintain an application u/s 47 CPC and (b) whether the relief sought for, is one which can be said to relate to execution, discharge and satisfaction of the decree. The explanation to Sub-section (3) of Section 47 CPC provides that for the purposes of that section, a purchaser at a sale in execution of the decree, is deemed to be a party to the suit and as such, the question between him and another party to the suit relating to the execution, discharge and satisfaction of the decree has to be determined by the executing Court and not by a separate suit. There is, thus, no difficulty in upholding the locus standi of the auction-purchaser to maintain an application u/s 47, Code of Civil Procedure, provided the other conditions enumerated therein are fulfilled. There is no dispute, in fact, in the instant case that the sale has been confirmed on 21-6-1966 and has, thereupon, become absolute. The only question, therefore which falls for consideration is whether after the sale has become absolute the application of the auction-purchaser for setting aside the sale can be said to be one in relation to execution, satisfaction or discharge of the decree.

It is contended on behalf of the Appellants that after the sale has become absolute, the decree is satisfied by reason of the decretal amount having been realised by such sale and no further question relating to execution, satisfaction or discharge of the decree remains outstanding. That would be so if the sale was a valid one. Section 47 CPC is worded in very comprehensive terms. It would apply to a dispute arisen in relation to the execution, discharge or satisfaction of the decree after it had been executed as it would apply to a similar dispute before it had been executed. Proviso to Section 47(3) CPC makes it clear that the auction-purchaser can raise dispute relating to execution, satisfaction and discharge of the decree only u/s 47, which means that disputes which he can raise would obviously arise after he has purchased. The question which the auction purchaser is raising is that the judgment debtors having no right in the properties brought to sale, the auction sale is a void one. That means that there has been no satisfaction of the decree. The process in bringing such property to sale, which related to execution, is called in question as to its validity. It is immaterial whether the question raised is of substance or not, but the question involves adjudication of matters relating to execution, discharge and satisfaction of the decree. I am, therefore, of opinion that the petition of the auction-purchaser is maintainable u/s 47, Code of Civil Procedure. That apart, it will be seen that this petition was directed, in effect, to be treated as one under 47 CPC by agreement of parties in M.A. 74/68. Thus, the points of maintainability must fail.

6. The next contention is that the application of the auction-purchaser is barred by limitation.

Mr. Ramdas contends that Article 127 (new Limitation Act) is the proper article to apply in the present case and since it provides a period of limitation of 30 days for filing of an application of the kind under consideration, and since the application in the instant case has been filed long after the expiry of such period, it is hopelessly barred by time.

Mr. Basu for the Respondents, on the other hand, contends that it is the residuary Article 137 which is applicable. Under this article the period of 3 years has been provided for filing of "any other application for which no period of limitation is provided elsewhere" from the date when the right to apply accrues. It is said that the sale in question is a void sale and Article 127 of the Limitation Act deals only with a voidable sale and there is no other article except Article 137 dealing with an application for setting aside a void sale.

The question, therefore, to be examined, is whether the sale in the instant case (sic) a void or voidable one. In view of the findings of the Courts below that the suit properties form part of an "estate" as defined in the Orissa Estates Abolition Act, the interest of the judgment-debtor, which was an intermediary's interest in nature vested in the State Government on abolition of that estate in 1965. Assuming he was in "khas" possession on the date of vesting, he lost his right to possession on account of his omission to file an application u/s 7 read with Section 8-A. Thus, the judgment-debtors were denied of all interest in the property which were subsequently brought to sale. This sale as already stated above, took place in the year 1966. The executing Court sold this property on the assumption that the judgment-debtor had interest in it while, in fact, they had been denied of all their interests in the property in the year 1966. It has been held in the case of AIR 1935 139 (Privy Council) , that where certain property sold was shown in the bid sheet to be the property exclusively belonging to the judgment-debtors, but at the time of the sale the title to the property was not in the judgment-debtor but in another, that sale was a nullity. Article 127 of new Limitation Act corresponds to Article 166 of the old Limitation Act of 1908. Article 137 of the new Limitation Act corresponds to Article 181 of the old Limitation Act. Dealing with Articles 166 and 181 of the old Limitation Act, the Calcutta High Court in the case of Nirode Kali Roy Choudhury and Another Vs. Rai Harendra Nath Choudhury and Another, said:

Article 166 must be confined to cases where the sale is voidable only and not void and when the execution sale is a nullity, if a party files an application u/s 47 to have it pronounced a nullity or for setting it aside for safety's sake to avoid future difficulties, the proper article would be Article 181 and not Article 166, Limitation Act.

This passage has been expressly, approved by the Supreme Court in the case of Merla Ramanna Vs. Nallaparaju and Others, . To the same effect is the decision of a Division Bench of the Patna High Court in the case of Central Bank of India Ltd. Vs. Gaibi Das and Others, . It is there said:

Where property was sold in execution of a decree as being the property of the judgment-debtor, but at the time of the sale the title to the property sold was not in the judgment-debtor but in another the sale is a nullity.

The ultimate legal position, therefore, is that where the sale is a nullity, the limitation for filing an application for setting aside the same is 3 years from the date when the cause of action for filing such an application accrues. The cause of action in this case accrued to the auction-purchaser on 10-5-1966 when the executing Court conducted the sale in which the auction-purchaser was the highest bidder. His application, for setting aside the sale having been filed on 3-8-1966 is well within the period of limitation of 3 years. This is not a case where Article 127 of the new Limitation Act applies. Thus, the contention of Mr. Ramdas that the auction purchaser's application is barred by limitation is of no substance.

7. It has been fairly conceded by Mr. Ramdas that if the auction-purchaser's application is treated as one u/s 47 CPC and the sale is held to be a nullity, the present appeal by the judgment-debtor is bound to fail. I am also of the same view. Since I have held above that the application is maintainable u/s 47 CPC and that the sale is a nullity, the present appeal fails and is dismissed with costs.