

(1989) 02 MP CK 0013
In the Madhya Pradesh High Court
Case No : L.P.A. No. 1 of 1980

Gangavishan Heeralal

APPELLANT

Vs

Gopal Digambar Jain and Others

RESPONDENT

Date of Decision : 08-02-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 54, Order 21 Rule 84, Order 41 Rule 1
Constitution of India, 1950 — Article 227

Citation : AIR 1989 MP 285 : (1990) ILR (MP) 561 : (1991) 36 MPLJ 666 : (1991) MPLJ 666

Hon'ble Judges : T.N. Singh, J;K.K. Varma, J

Bench : Division Bench

Advocate : H.K. Jain and K.K. Lohoti, for the Appellant; B.S. Agarwal, for the Respondent

Final Decision : Dismissed

Judgement

T.N. Singh, J.

In this appeal, the question of maintainability has been raised -as a threshold objection to its hearing. That question, we propose to consider and dispose of first.

The judgment-debtor is the appellant and he came to this Court assailing validity of an order passed on 30-1-1979 by District Judge, Morena, in Execution Proceedings. By that order, the Court directed Sale Certificate to issue in favour of the auction-purchaser for the property auctioned on 22-11-1978. His objection against the "Sale" was that the sale had been conducted with material irregularity inasmuch as the auction purchaser's application dated 23-11-1978 could not have been allowed for allowing him to make deposit of 25% of the amount of the purchase-money as he had not made that deposit in accordance with law on the date of auction, namely, 22-11-1978. Admittedly, that amount was deposited on 24-11-1978 and the balance on 7-12-1978. A learned single

Judge of this Court, by his order passed on 13-11-1979 in Misc. Appeal No. 14 of 1979 dismissed the appeal.

Even for considering and deciding the preliminary objection to maintainability of the instant appeal, some facts are necessary to be stated. A money-decree was passed on 14-7-1976 against the instant appellant for a sum of Rs. 34,200.50 with interest and also costs and Execution was levied in respect thereof on 15-11-1976. In that proceeding, certain house property was attached and put to sale. The first sale aborted when by an order passed on 3-12-1977, District Judge, Morena ordered refund of the 25% deposit made at the time of auction because the remaining amount of bid-money had remained undeposited till then. In the resale, proceedings protracted and eventually, respondent No. 2 Govind Singh made a bid for Rs. 72,000/- which, as per order passed by District Judge Morena, was knocked down on 22-1-1978. Admittedly the requisite earnest-money of 25%, amounting to Rs. 18,000/- was not deposited and by the same order, he was allowed to do so on 24-11-1978. The order impugned in appeal before the learned single Judge was passed on 30-1-1979 by learned District Judge by which he rejected the application of the judgment-debtor, the instant appellant, and made the sale absolute direct ing Sale Certificate to issue in favour of the auction-purchaser. Govind Singh.

Appellant's counsel Shri N. K. Jain made a twofold contention, replying to the objection of maintainability of the instant appeal. Counsel has relied on the provisions of Clauses (a), (p) and (q) of Section 97(2) of the CPC (Amendment) Act, 1976, in support, of his first contention. In so far as reliance on Clauses (a) and (q) is concerned, the least said is the best. The 1976 Amendment Act came into force from 1-2-1977 and on that date, admittedly, the appeal preferred by the judgment-debtor before the learned single Judge was not pending, it was filed on 19-2-1979. Accordingly, Clause (a) has no application to the instant case. About Clause (p), suffice it to say that reliance thereon is wholly misconceived inasmuch as there is no relevance of S. 141 of C.P.C. to the Execution Proceedings in respect whereof provisions of Order 21, only are to be applied. However, something has to be said to on Clause (q) which we extract:

"(a) The provisions of Rr. 31, 32, 48A. 57 to 59, 90 and 97 to 103 of Order XXI of the First Schedule as amended or, as the case may be substituted or inserted by Section 72 of this Act shall not apply to or affect -

(i) Any attachment subsisting immediately before the commencement of the said Section 72. or

(ii) any suit instituted before commencement under Rule 63 aforesaid to establish right to attached property or under Rule 103 aforesaid to establish possession, or

(iii) any proceeding to set aside the sale of any immovable property,

and every such attachment, suit or proceeding shall be continued as if the said

Section 72 had not come into force;

4A. Although reliance is placed by Shri Jain on sub-Clauses (iii) of Clause (q) aforequoted, we find it difficult to accept that any benefit would accrue therefrom to the appellant. The purport of Clause (q) clearly, on its own language, it to save "any attachment subsisting", or "any suit instituted before commencement" (of the Amending Act) and "any proceeding to set aside the sale" which must obviously have taken place before the commencement of the Amending Act and the proceeding in respect thereof must have been pending accordingly on the date of commencement of the Amending Act. In the instant case, the sale having taken place on 22-11-1978 and objection to set aside the sale having been made on 20-11-1978 by the judgment-debtor, which was disposed of, as earlier alluded, on 30-1-1979. reliance on sub-Clauses (iii) must be deemed wholly inappropriate. Apparently, the amended provisions would apply in the facts and circumstances of the case and as such, against the order passed on 30-1-1979, the judgment-debtor had the right to prefer an appeal under Order 43, Rule i(j), C.P.C. as his application for setting aside the sale was rejected.

There is no doubt that the resort was had to that remedy and appeal preferred by the judgment-debtor under Order 43, Rule 1, C.P.C. was heard and disposed of by the learned single Judge, Shri B. Section Agrawal has, therefore, rightly contended that the order of the learned single Judge cannot be challenged in Letters Patent Appeal because of what a Division Bench of this Court has held in *Rajmata Vijayaraje Scindia*, (1988 MPLJ 78 : 1988 Jab LJ 86). We have no doubt that the order of the learned District Judge; passed on 30-1-1979, cannot be regarded as a "decree" fictionally, taking recourse to Clause (a) never (q) of Section 97(2), for the reasons earlier alluded. The appellant/judgment-debtor had rightly preferred appeal against that order and that was entertained and disposed of rightly also in accordance with the provisions of Order 43, Rule 1, C.P.C. We do not see any reason today "to differ from the view "taken in *Rajmata Vijayaraje Scindia*"s case (supra) and accordingly, we have no other option except to hold that the instant Letters Patent Appeal is not maintainable.

However, Shri Jain's second contention still survives and we propose now to consider that. Counsel has submitted that on merits, the order passed on 30-1-1979 by learned District Judge be analysed and if that is done, this Court is bound to hold that order to be a nullity. Thus, notwithstanding" dismissal of appeal against that order by the learned single Judge, it would be within our competence to act under Article 227 of the Constitution to strike down that order, passed on 30-1-1979 by learned District Judge, holding the same to be devoid of jurisdiction and therefore null and void. In so far as merits are concerned, authorities are cited and reliance is placed mainly on the decision of the Apex Court in the case of *Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another*, and of this Court in *Ravindranath and Others Vs. Panna Lal and Others*, but we do not think if the course suggested by learned

counsel would be a proper course to be resorted to by us in the facts and circumstances of the case.

We have no doubt that the decisions cited support the contention that Rule 84 of Order 21, C.P.C. is mandatory as regards deposit of 25% of the purchase-money on sale being knocked down and learned District Judge had no jurisdiction to disturb the time-scale statutorily prescribed for deposits to be made by the auction-purchaser when an auction-sale is held for sale of any immovable property in the execution of a decree. However, the question to be considered is whether it would be proper to allow the judgment-debtor to avoid an order lawfully passed by Court of competent jurisdiction, namely, by the learned single Judge and to invoke our extraordinary jurisdiction under Article 227 of the Constitution to set at naught the effect of that order. It was open to him to prefer appeal against that order to the Highest Court of the land; but having waived that right, it is not open to him to come to this Court once again against an order earlier obtained from this Court to reargue the matter on another ground or re-interpretation of the law. Indeed, unless it is possible for us to hold that the earlier order passed by this Court, can be treated as nonest in law, any order passed by us in exercise of our jurisdiction under Article 227 of the Constitution would itself be devoid of jurisdiction if by that order, an order of this Court passed in valid exercise of jurisdiction is virtually set aside.

In the result, we find no scope for interference in this Letters Patent Appeal for the reasons aforesaid. The appeal is dismissed, but there shall be no order as to costs.