(1949) 04 SHI CK 0001

In the High Court Of Himachal Pradesh

Case No : Further Civil Appeal No. 37 of 1948

Gauri Ram APPELLANT

Vs

Jaishi Ram and Another RESPONDENT

Date of Decision : 08-04-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 21 Rule 92, Order 21 Rule 92(3)
Limitation Act, 1908 — Article 12 , 95

Citation : AIR 1950 HP 1

Hon'ble Judges : Bannerji, C.J

Bench : Single Bench

Advocate : L.N. Sethi, for the Appellant; Des Raj, for the Respondent

Final Decision : Allowed

Judgement

Bannerji, C.J

1. This is an appeal against a judgment and decree of the Chief Court, dated 23rd Asoj 2003, reversing a judgment and decree of the District Judge dated 17th Bhadon 2003, and restoring the judgment and decree of the Subordinate Judge, dated 2nd Jeth 2003, by which the suit was decreed.

2. One Jaishi Ram, who was made a party to the suit as a defendant but who has not put in his appearance throughout these proceedings, in execution of an ex parte decree obtained by him against the plaintiff Jainand had Jainand''s shop sold. The defendant, Gauri Ram, is the auction-purchaser. The shop was sold on 27th Magh 1997 and the sale was confirmed on the same date. The auction purchaser, Gauri Ram, then obtained possession of the shop.

3. In Har 1999, sixteen months after the date of the confirmation of the sale, Jainand brought this suit for a declaration that the sale was illegal and without jurisdiction and should be declared null and void on grounds of fraud practised on the Court.

4. The defence was that the sale was valid and binding on the plaintiff.

5. The trial Court dismissed the suit on the ground that it should have been brought within one year from the date of the confirmation of sale under Article 12, Limitation Act.

6. On appeal, the learned District Judge found that

"the total omission to issue notice coupled with the absence of the judgment-debtor from Chamba State and thus having no knowledge of the sale proceedings makes the sale absolutely void. It was the duty of the decree-holder to have the notice issued under Order 21, Rule 66 and in ease of default, as here, of paying the process fee in getting such a notice issued would fall under Order 21, Rule 67."

The learned Judge relied upon the five decisions quoted in his judgment and found that the sale was void as no notice was issued to the plaintiff judgment-debtor under Order 21, Rule 66. He accordingly set aside the sale and ordered that the plaintiff should deposit the purchase money including the costs of sale for payment to the defendant, Gauri Ram, the auction-purchaser. On default, his suit will stand as dismissed or in other words, the sale would become absolute.

7. Against this decision Gauri Ram appealed to the Chief Court.

8. The learned Chief Judge accepted the contention that the omission to issue notice under Order 21, Rule 66 was an irregularity in publishing and conducting the sate. In his opinion there was an inherent lack of jurisdiction and the proceedings were quoram non-judice and therefore, a suit to set aside the sale was competent. He finally held that,

"non-issue of notice under Rules 64 and 66 strikes at the root and omission is an irregularity in proceedings which are anterior to publishing or conducting the Bale and make the sale illegal and void."

He further hold

"that confirmation before thirty days is illegal and there is no confirmed sale in the eye of law. That non-issue of notice under Rules 54 and 06 amounted to and resulted in practising fraud on Court and therefore, a suit lay to aet aside illegal orders and cancel sale and Such a suit is not governed by Article 12, it comes within Article 95, or residuary Article 120 and is within time."

He accordingly dismissed the appeal with the consequence that the suit was decreed in terms of the judgment and decree of the District Judge dated 17th Bhadon 2003

9. The point of law involved in this appeal is two-fold :

(a) Whether a suit is competent in view of Rule 90 of Order 21, Civil P. C. ?

(b) If the suit is competent, which of the Articles, namely, Article 12 or 95, Limitation Act is applicable ?

10. As regards the first point, the learned counsel for the auction-purchaser, Gauri Bam argues that the suit is not maintainable under the provisions of Rule 90 of Order 21, Civil P. C.

11. The above Rule provides :

"Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sate, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it (the italics are mine) :

Provided 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."

12. Further, Rule 92 of Order 21 provides:

" Where no application is made under Rule 89, Rule 90-or Rule 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."

Sub-rule (8) of the same Rule provides :

"No suit to set aside an order made under this rule shall be brought by any person against whom such order is made."

13. The learned counsel relies upon this Sub-rule (3) and contends that the plaintiff is debarred from bringing a suit to set aside the sale.

14. There is much force in his contention. The Legislature intended that all matters relating to the sale, after an auction takes place should be decided not only by the Court that holds the sale but also without the least possible delay.

15. It is admitted that the plaintiff could have applied under Order 21, Rule 90 to set aside the sale within thirty days as provided by Article 166, Limitation Act. But the plaintiff alleged that he could not do so as the sale was confirmed on, the very date it was held. He was fraudulently debarred from challenging the sale under Rule 90 of Order 21. The learned advocate for the plaintiff argues that it may be held that the defendant got the sale fraudulently confirmed and that the order confirming the sale should be set aside. The plaintiff further alleges that he was not able to resort to Rule 90 of Order 21, in order to show that there was fraud in publishing and conducting the sale.

16. In my view, the plaintiff was shut out from his remedy which law provides under Order 21, Rule 90. The indecent haste with which the sale was confirmed cannot but be deemed to have been in fraud of the plaintiff. Once it is held that the sale was confirmed on the very date, the inference is that the sale was confirmed and made absolute in order to prevent the plaintiff from obtaining

relief under Rule 90 of Order 21, Civil P. C. The sale consequently becomes voidable and the plaintiff ig entitled to bring a suit to set aside the confirmation of the sale.

17. Upon the whole, I agree with the reasonings of the learned Chief Judge that the plaintiff''s suit is competent and that the confirmation before thirty days as provided by Article 166, Limitation Act, was illegal and that the sale did not become absolute in the eye of law.

18. Where a sale in execution of a decree is duly confirmed by an order of the Courtand has become absolute under Rule 92 of Order 21, Civil P. C., an application u/s 47, Civil P. O, does not lie, The only remedy is by way of a suit: Ramasami Konan Vs. Kulandai Velu Pillai,

19. The second point is which of the Articles, namely, Article 12 or 95, Limitation Act is applicable to a suit of this nature.

20. Article 12 is as follows :

Description of suit.

Period of limitation.

"Time from which, period begins to run.

To set aside any of the following sales :

(a) Sale in execution of a decree of a. Civil Court ;

One year

When the sale is on firmed or would otherwise have become final and conclusive had no such suit been brought.

(b) Sale in purau anoa of a decree or order of a Col-lector or other officer of revenue;

(c) Sale for arrears of Government revenue, or for any demand recoverable aa such arrears ;

(21) Article 95 is as follows :

To set aside a decree obtained by fraud or for other relief on the ground of fraud.

Three years

When the fraud becomes known to the party wronged.

22. Whether a suit instituted is for setting aside a sale or not is to be decided not from the form of the relief but from a consideration of substance of the relief sought for by the plaintiff: Shiva Ram v. Subram Mania 9 Mad. 67. It has been laid down by their Lordships of the Judicial Committee in the well-known case, Mallcarjun v. Narhari 27 I. C. 216 : 25 Bom. 387 (P.C.), that when the sale is

only voidable at the instance of the plaintiff, he cannot avoid the application of this article (Article 12), by seeking reliefs which though different are inconsistent with the validity of the sale. Their Lordships further observe as follows :

"The Limitation Act protects bona fide purchasers at judicial sales by providing'' a ''abort limit of time within which suits may be brought to set them aside. If the protection is to be confined to the suits which seek no other relief than a declaration that the sale ought to be set aside, and is to vanish directly some other relief consequential on the annulment of the sale is sought, the protection is exceedingly small..... Both the letter and spirit of the Limitation Act require that this suit when looked on to set aside a sale should fall within the prohibition of the Article."

23. Article 95 provides three years limitation

"When the fraud becomes known to the party wronged."

24. The plaintiff''s case is that, the fraud was practised at the confirmation of the sale and he never alleged that ho would count the time running against him from the discovery of the fraud. He claimed that the sale was voidable because the fraud was practised at the confirmation of the sale. He himself counted the time from the date of the confirmation of the sale. His principal grievance was that he was not given an opportunity to challenge the sale under Rule 90 of Order 21, Civil P. O., and upon this ground alone his suit was found competent and maintainable. On the other hand, if the longer period as provided by Article 95 is assumed to be applicable, a bona fide purchaser would be put into a very great inconvenience and hardship from which the Limitation Act is designed to protect him. His protection, in the words of their Lordships of the Privy Council, will be very small if for three years from the date of the confirmation of the sale, he will remain in a doubtful possession whether his purchase will be challenged during three years.

25. It will be seen that Article 95 relates to suits challenging the decree on grounds of fraud, and the limitation starts from the date of the knowledge of fraud.

26. It is a general article and Article 12 is a special article. The learned advocate for the plaintiffs is definite that the ex parte decree is not challenged on the grounds of fraud nor is it alleged in the plaint that the ex parts decree is fraudulent. It is the sale that is challenged. The learned advocate refers me to two decisions of Patna High Court, namely, Kumar Ramishwar Narain Singh Vs. Mahabir Prasad and Others, and Madho Saran Singh Vs. Manna Lal and Others, These decisions are easily distinguishable upon allegations of fraud relating to the decree. When the present suit is based on allegations of fraud regarding the confirmation of sale, I do not think that Article 95 is applicable.

27. After having given the best consideration and thought to this point, I feel that the shorter period of limitation as prescribed by Article 12, namely, one year

from the date of confirmation of the sale is applicable and the same reasonings which their Lordships discussed in Malkarjun v. Narhari 27 I. A. 216 : 25 Bom. 887 P. C., mentioned above will apply to the present case.

28. The plaintiff''s suit having been brought after sixteen months from the date of the confirmation of the sale must be declared to be beyond the period of limitation as provided by Article 12, Limitation Act. I shall advise the Chief Commissioner to allow the appeal, reverse the decision of the Chief Court and that of the District Judge and restore the judgment and decree of the Subordinate Judge. In the special circumstances of the case, there shall be no order as to the costs of this appeal.

