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(1936) 01 PAT CK 0037

In the Patna High Court

Harihar Prasad Singh and Others APPELLANT

Vs

Bhubneshwari Prasad Singh and Others RESPONDENT

Date of Decision : 16-01-1936

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 2, 47
Criminal Procedure Code, 1898 (CrPC) — Section 145

Citation : AIR 1936 Patna 270

Hon'ble Judges : Macpherson, J;Dhavle, J

Bench : Full Bench

Judgement

Dhavle, J.—This appeal arises out of an application u/s 47, Civil P.C., to set aside an execution sale. The decree under execution was obtained by the appellants in May 1932, against four sets of defendants, out of whom we are concerned with two only, namely, respondents 1st party and respondents 2nd party. It was a joint and several decree for Rs. 3,430 and against the four sets of defendants who each had a four annas interest in the properties to which the decree related. In August 1932 the decree-holders applied for execution against defendants 1st party and defendants 2nd party, who resisted on the ground among others that the decree had already been satisfied. Their objections were overruled, and 6 items of property, 3 belonging to defendants 1st party and 3 to defendants 2nd party, were attached and advertised for sale. The sale was actually held on 24th May 1933, and the decree-holders bought the 3 items of property belonging to defendants 1st party for a price totalling the entire amount for which the execution was levied, with the result that the other 3 items of property were not proceeded against. On 22nd June 1933 defendants 1st party made an application under Order 21, Rule 90, to have the sale set aside.

2. In the course of this proceeding they stated on 8th December 1933, that they had come to know of a sale deed executed by defendants 2nd party in favour of the decree-holders by which the decree-holders'' dues were satisfied. No details were apparently given, but on 17th March 1934, they applied again, saying that they had come to know on 7th December 1933, that half the decree had been

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satisfied by the sale-deed of defendants 2nd party in favour of the decree-holders and that therefore the sale should be set aside on the ground of the decree-holders'' fraud. The date of the sale-deed was not given, and the Munsif held that the allegations were irrelevant to the proceeding before him, but that it was open to the objectors to file an application u/s 47 or Order 21, Rule 2, giving the date of satisfaction. On 19th March, the application under Order 21, Rule 90 was dismissed after trial. There was an appeal which was summarily dismissed by the District Judge in April 1934, and then there was an application in civil revision to this Court, which was disposed of by Wort, J., upholding the orders of the lower Courts. The learned Judge dismissed the application on the ground that the satisfaction alleged by the objectors was not a matter under Order 21, Rule 90, and that they, the objectors, had sat down under the order of 17th March, leaving it open to them to apply u/s 47, and he added:

The petitioners had certain rights or they must be presumed to have certain rights apart from the question of limitation which I do not propose to deal with, and I assume that those rights exist at the present moment. This Court does not revise the orders of the Subordinate Courts in matters in which the parties have remedies within their own hands as they had in this case.

3. About two weeks after this, on 24th September 1934, defendants 1st party applied to the lower Court u/s 47 for setting the sale aside on the ground that the decree had already been satisfied to the extent of half under a sale-deed executed on 28th March 1933, by defendants 2nd party in favour of the decree-holders. The sale-deed in fact says nothing about any satisfaction of the decree; and the learned Munsif dismissed the application, holding as matter of fact that half the decretal dues had not been satisfied and as a matter of law that the application, though headed as an application u/s 47, really fell under Order 21, Rule 2, and was barred by limitation. On appeal the learned Subordinate Judge of the Second Court, Monghyr, differed from the Munsif on both points and allowed the application. The decree-holders have accordingly appealed; respondents 1st party are judgment-debtors 1st party, being the objectors, and respondents 2nd party are defendants 2nd party who executed the kobala in favour of the decree-holders in the name of their nominee, one Babu Hit Narayan Singh.

4. It has been contended on behalf of the appellants that the lower appellate Court has erred both on the facts and as regards the law. The learned Subordinate Judge finds that half the decretal amount was satisfied by the kobala on the ground of a statement made by Brahmadeo Narayan Singh, one of the decree-holders, on 28th February 1934, in a proceeding u/s 145, Criminal P.C., that his entire demand against respondents 2nd party was satisfied. That deposition was not made in the course of the execution proceedings, nor was it made in proceedings to which defendants 1st party were parties. The deposition was admitted in evidence without any objection, but if it is read as an admission that half the decretal dues were satisfied by the kobala, it is opposed to the evidence of Brahmadeo Narayan Singh himself witness 3 for the defendants 1st

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party in these proceedings, who says that what he had deposed on that occasion was that nothing was due to him on account of certain mortgages. Ram Prakash, son of the leading member of defendants 2nd party, was witness 1 for the objectors and claimed to have paid up half the decretal amount by executing the kobala, but he had to admit that his share (the share of this party) "was four annas in the decretal dues," and that it is not entered in the kobala that half the decretal dues were satisfied. His cross-examination concludes with the statement that the decree-holders had told him that they would realize the entire decree from Bhubaneshwar (the leading member of defendants 1st party.) None of this evidence, which was considered by the learned Munsif along with Brahmadeo Narayan''s deposition of 28th February 1934, was referred to by the learned Subordinate Judge.

5. In support of his reading of somewhat ambiguous deposition as an admission that the consideration for the sale included half the decretal amount, the learned Subordinate Judge referred to the fact that the decree-holders had actually put up to sale only those items of property that belonged to defendants 1st party. It was pointed out to him that as these items of property fetched the amount under execution, it was unnecessary for the decree-holders to proceed against the properties belonging to defendants 2nd party, but the learned Subordinate Judge said that he was not much impressed with this contention, and that the decree-holders could easily have put up to sale some of these properties, had they been so minded, but that they had deliberately abstained from doing so and that they had not come to Court with clean hands because they had failed to certify to the Court the adjustment entered into with defendants 2nd party. A finding of fact by the lower appellate Court that half the decretal amount "was satisfied" as alleged by the objectors would be binding upon us in second appeal, provided it was arrived at on a fair consideration of the evidence in the case, even if the Subordinate Judge erred in his reasoning and argued in a circle as he has clearly done. But the finding in the present case practically ignores all the evidence in the case, particularly those circumstances specifically mentioned by the trial Court which led that Court, on a construction of the deposition, to the opposite conclusion. It is however unnecessary to say anything further about the finding of fact of the lower appellate Court, because it is quite clear that the order of the lower Court cannot be supported on the law.

6. The learned Subordinate Judge held that the application of respondents 1st party was not governed by the 90 days limitation laid down in Article 174, Limitation Act, because it came not under Order 21, Rule 2, but u/s 47, Civil P.C. The case of respondents 1st party was that the respondents 2nd party had paid half the decretal amount to the decree-holders; and Clause 3, Order 21, Rule 2, which deals with "payment out of Court to decree-holder" provides that:

A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree.

7. The learned Subordinate Judge accepted the contention of respondents 1st

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party that this provision does not apply to a payment made by one judgment-debtor but set up by another judgment-debtor in order to have a sale of his property set aside. The clause does not speak of any judgment-debtors or decree-holders at all; but the learned Subordinate Judge held that Clause 2 of the Rule which enables "the" judgment-debtor to apply to the Court and have a payment made out of Court recorded as certified applies only to the particular judgment-debtor who makes such payment. This conclusion was rested on the use of the definite article before the word "judgment-debtor" in the clause. The reasoning is manifestly unsound, and the definite article is, as a matter of grammar, easily intelligible as distinguishing not one judgment-debtor from another but one party to the suit from the other, the judgment-debtor from "the" decree-holder already dealt with in Clause 1 of the Rule. The appellants have been able to find a decision, Mehbunissa Begum v. Mehmedunnisa Begum 1925 Bom 309, in which some judgment-debtors set up payments made by other judgment-debtors which were not certified, and it was held that the words of Clause 3

are too plain to admit of any other construction than that the Court executing the decree is barred in limine from considering any allegation that a payment not certified has been made. The party alleging such a payment may have a remedy, but not before the Court executing the decree.

8. This was a Full Bench decision overruling the view taken in Hansa Godhaji v. Bhawa Jogaji 1916 Bom 217, in accordance with the views of Heaton, J., in Trimbak Ramkrishna v. Hari Laxman (1910) 34 Bom 575, that a Court executing the decree could deal with the question whether uncertified payments had, as a matter of fact, been made or not. It is true that in Mehbunissa Begum v. Mehmedunnisa Begum 1925 Bom 309 no contention was raised that Clauses 2 and 3 of Order 21, Rule 2 refer only to payments made by the particular judgment-debtor who applies to have the sale set aside. But what possible reason can there be for the legislature to enact that the judgment-debtor who pays himself must apply within 90 days to have the payment recorded or (failing to do so) remain without any remedy in the Court executing the decree, while leaving it open to the other judgment-debtors, who have an even smaller claim on the decree-holder and the executing Court alike, to assail the execution within the three years allowed under Article 181, Limitation Act, for applications for which no period of limitation is provided elsewhere in the schedule or by Section 48, Civil P.C.? As Rankin, C.J., observed in the Full Bench decision in Lakshman Chandra Naskar v. Ramdas Mandal 1929 Cal 374, the legislature could not, in enacting Order 21, Rule 2, have been ignorant that decrees will be executed despite unrecorded adjustments and that such cases would commonly, if not necessarily, raise a question of fraud; and the rule was introduced, as Dawson Miller, C.J., said in Sukhdei Kumri v. Mahamaya Prasad 1918 Pat 278, with the very object of avoiding in execution proceedings disputes between the parties, and frequently long enquiries, as to what sums had or had not been paid out of Court in satisfaction of the decree.

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9. It was pointed out in Imamuddin Khan v. Bindubasinm Prasad 1920 Pat 833, following Biroo Gosain v. Mt. Jaimurat Koer 16 CWN 923, that the judgment-debtor who pays out of Court is not at liberty to plead in the executing Court that the decree-holder has been guilty of fraud in failing to have the payment recorded, because Clause 2 of the Rule enables him to protect himself by having the payment recorded. An omission on the part of the decree-holder to certify a payment, even if he may have promised to do so, does not entitle the judgment-debtor to override the 90 days'' limitation of Article 174 for making an application under Order 21, Rule 2, and to secure an investigation of the same matter by invoking Section 47: see Mukund Lal De v. Bansidhar Marwari 1928 Cal 342. The decree-holder may be guilty of fraud, but if the judgment-debtor does not avail himself of the procedure laid down in Clause 2 of the Rule, he must be content to let the sale of his properties in execution stand, and as Rankin, C.J., said in the case already referred to, seek his remedy in damages or otherwise without challenging the sale.

10. The view taken in some old decisions that uncertified payments ought to be inquired into u/s 47 because the Court will not tolerate fraud is not now, so far as I am aware, accepted in any High Court; and Mr. Mahabir Prasad''s contention that the Court need not look helplessly on the decree-holder''s fraud but may deal with it in the exercise of its inherent jurisdiction is opposed to the scheme of the CPC as found in Section 47 and Order 21, Rule 2. This being the position when there is only one judgment-debtor, it is inconceivable that the legislature could have intended, where there are several judgment-debtors in a case, to place the judgment-debtor who does not pay in a stronger position to assail the execution proceedings than another who does pay. It is true that the judgment-debtor who does not pay may conceivably, unlike one who does pay, be able to avail himself of Section 18, Lim. Act, in getting a payment by another recorded by showing that the decree-holder had by means of fraud kept him from the knowledge of his right to do so; but this is merely because the judgment-debtor who does pay cannot plead ignorance. No such case, however, was made out in the application of respondents 1st party, which speaks of fraud in para. 12 alone, the fraud consisting merely in not giving credit for the moiety of the decretal amount realized from respondents 2nd party and realizing the entire decretal amount by the execution sale. Bindeshwari Prasad Singh, the only member out of defendants 1st party who went into the witness box, speaks of coming to know of the kobala of respondents 2nd party on 7th December 1933, but the kobala makes no mention of the decree under execution; and while his statement in cross-examination that his uncle, the leading member of respondents 2nd party told him that he had satisfied half the decretal dues is not supported by any evidence nor accepted by the lower Courts, he proceeds to say that the uncle told him so "one day or one month or one year after the kobala," which he immediately changes to "I came to know from the deposition of Brahmadeo Narayan." That deposition was dated 28th February 1934, and could not have been the basis of his application of 8th December 1933.

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11. Quite apart from the fact, therefore, that as shown by the learned Munsif on a consideration of the entire evidence the deposition does not establish the payment of a moiety of the decretal amount by respondents 2nd party, it is clear that the respondents 1st party failed to show that their application was made under Clause 2, Order 21, Rule 2 within 90 days of coming to know of what they called the decree-holders'' fraud in proceeding with the execution for the entire decretal dues. The contention that a party may be barred under Order 21, Rule 2, and yet may move for the same relief u/s 47 has been repeatedly held to be unsound; nor does the fact that the respondents 1st party erroneously, as it was found, pleaded the kobala in the proceedings under Order 21, Rule 90 on which much stress was laid by Mr. Mahabir Prasad, entitle them to any relief in this proceeding in view of the circumstance that, as I have already shown, they made no real effort to establish that they moved the Court within 90 days of their knowledge of the alleged payment by respondents 2nd party. Mr. Mahabir Prasad has endeavoured to read Wort, J''s observations which I have already quoted as amounting to a decision that respondents 1st party were entitled to proceed u/s 47 in respect of the alleged payment. But the learned Judge expressly declined to deal with the question of limitation, and it is under Clause 2, Order 21, Rule 2, read with Article 174, that the question of limitation arises in the case. The learned Subordinate Judge was, in my opinion, entirely mistaken in holding that these provisions of the law had no application to the case, on the ground that the payment set up is not a payment made by respondents 1st party themselves.

12. I would, therefore, allow the appeal, reverse the order of the lower appellate Court, and dismiss the application made by respondents 1st party on 24th September 1934, with costs in all Courts.

Macpherson, J.

13. I agree.

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