

(1957) 09 AHC CK 0044

In the Allahabad High Court

Case No : F.A.F.O. No. 219 of 1954 and Civil Revision No. 946 of 1954

Joshi Girjadharji

APPELLANT

Vs

Rao Sanwal Das, Shahpuri and Others

RESPONDENT

Date of Decision : 12-09-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 2A, Order 43 Rule 1, 104(1)

Citation : AIR 1958 All 639

Hon'ble Judges : B. Mukerji, J

Bench : Single Bench

Advocate : Ambika Prasad, for the Appellant; K.B. Asthana and K.B. Garg, for the Respondent

Final Decision : Partly Allowed

Judgement

B. Mukerji, J.—These are two connected matters arising out of the same judgment of the First Additional Civil Judge of Banaras.

2. A suit was filed by the wife and two sons of a judgment-debtor for a declaration that a certain property was not saleable in execution of the decree obtained against the judgment-debtor. During the pendency of the suit an application was made for an injunction restraining the decree-holder from proceeding with the sale of the property. A share in the property -- the share of the judgment-debtor alone -- was, however, sold and purchased by the decree-holder on 18-2-1954.

3. The respondents applied to the court which had issued the injunction to take action against the decree-holder for having disobeyed the injunction by putting the property to sale and purchasing it himself. The court below found that there had been a disobedience of the injunction which had been granted on 30-9-1953. The court, therefore, directed that the sale, which had taken place in defiance of the injunction, be set aside and further directed the appellant to suffer simple imprisonment for a period of five days.

4. Mr. K. B. Asthana, appearing on behalf of the respondent raised a preliminary objection to the effect that no appeal lay. Mr. Asthana's contention was that this appeal was purported to have been filed under Order 43, Rule 1 (r) of the CPC and that under that rule an appeal lay only against an order made under rules 1, 2, 3 or 10 of Order 39. Mr. Asthana, further contended that as this High Court had amended the provisions of Rule 2 by deleting Sub-rules (3) and (4) and substituting them by a new rule -- Rule 2a, the right of appeal which had been conferred by Sub-rule (r) of Rule 1 of Order 39 could not be available to the appellant for filing his present appeal-Reliance was placed on the decision of Agarwala, J. in Kefayat Husain v. Abdul Rashid 1951 AWR 636 (A). In this case Agarwala, J. expressed that the result of the amendment was to make a separate Rule 2-A, and there being no consequent amendment in Order 43, Rule (1) Sub-rule (r), no appeal lay from an order made under this rule. It is not necessary for me to go into the question whether the fact that this Court had deleted Sub-rules (3) and (4) and had replaced those by Rule 2-A in Order 39 a right of appeal had been lost because no consequent amendment had been made in O. 43, because I am of the opinion that even apart from Order 43, Rule 1, a right of appeal from orders is provided for by S. 104 of the CPC and this right has not been curtailed by Order 43, C. P. O. Section 104(1)(h) provides :

"(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree."

5. Therefore, an appeal would lie if the order under appeal were to fall within Sub-section (1) (h) of Section 104. There can be no manner of doubt that the order against which the appeal has been filed is an order by which the Court below has directed detention of a person in civil prison, and that this detention was not in execution of a decree. As I have already pointed out, the detention was ordered because the appellant was held to have been guilty of a breach of an injunction -- that is to say he was held to be guilty of contempt.

I am to an extent supported in my view by the decision in Padarath Tewari Vs. Dulhin Tapesha Kuri and Others, where Sulaiman, Acting C. J. and Niamatullah, J. held that u/s 104(h) an appeal was expressly provided from an order directing the arrest or detention in the civil prison of any person otherwise than in execution of a decree. I would, therefore, hold that the preliminary objection raised by Mr. Asthana had no substance and that the appeal did lie.

6. After having held that the appeal is entertainable, I come to determine the question of its merits. On the merits I am clearly of the opinion that the order of the Court below directing the appellant to suffer simple imprisonment for a period of five days was utterly unjustified. The Court below, I regret to say, did not carefully scrutinize the various orders which had been made in this case.

An examination of the orders on the record indicated that this execution matter, particularly the various applications for injunctions, which had been made from

time to time and objections which had been preferred to those applications from time to time on behalf of the decree-holder, were dealt with in a slipshod manner without due regard being had to either chronology or proper sequence or even consistency. The orders which should have been made on one application found their place on another. In short, the whole matter was in a state of confusion.

To take an illustration: an application was made on the 16th of September, 1953, by the plaintiffs with a prayer that defendant No. 6, namely, the appellant before me, be restrained from proceeding in execution against a certain share in the property. An order on this application was first made ex parte, and the 30th of September, was fixed for the disposal of this matter after notice to the decree-holder. The decree-holder put in his objections on the 22nd of September, 1953; these objections are on paper No. 140-C: the application of the plaintiffs was paper No. 135-C. On the 30th of September, 1953, the Court made the following order : --

"The debt had been challenged. It will be inadvisable to sell the property. Rejected."

This order was written on the application of the plaintiffs, that is on paper No. 135-C. The order, if it related to the aforementioned application and objections, should have been made on the objections of the defendants, i.e. on paper No. 140-C. Anyone not being fully aware of the sequence of events, anyone not carrying all the knowledge of all the proceedings in his mind, on the finding of the order which says "rejected" could easily and possibly justifiably think that the application on which that order was written stood rejected. Further, it appears that there was a good deal of conflict between the various orders that have been made in this execution matter. An order was made as far back as the 27th of May, 1950, to the following effect:

"Heard the defendant. The defendant can no doubt proceed against the share of Baman Das but the execution in respect of the rest of the property is stayed."

7. It may be noticed that Baman Das was the judgment-debtor and he had, under law a certain share in the property. This order does not appear to have been set aside by any subsequent order: indeed, no subsequent order makes any reference to this order.

8. The entire argument of the learned Judge, on which he has held the appellant guilty of the disobedience of an injunction, is that the appellant having been party should have known the true position and should have refrained from putting the property to sale in view of certain orders which had been made in the case, even though those orders were wrongly set down on an application on which it should not have appeared.

I cannot say that the learned Judge was absolutely wrong in the view that he took; possibly the appellant was aware of the true state of affairs. But this finding is based not on evidence but on mere suspicion. I do not think that the

appellant should suffer imprisonment on mere suspicion. There must be positive proof of the fact that he deliberately disobeyed an injunction before a Court should deprive him of his property or send him to imprisonment.

9. The grant of an injunction is a serious matter and Courts always take good care to grant an injunction in cases only where such an injunction is essential. Injunctions are never lightly granted by Courts. Punishing a person for disobedience of an injunction by ordering him to suffer imprisonment is a still more serious matter and before a person can be made to suffer such a consequence it must be shown without any doubt that the person against whom action was contemplated could not have any other belief than that there was a subsisting injunction under which he could not act in the manner in which he did.

Under the circumstances of the present case, it could not be said without straining some of the orders that the appellant could not entertain the belief that he could, at any rate, put the share of his judgment-debtor to sale. I am, therefore, clearly of the opinion that the appellant in this case should not have been punished for breach of the injunction by ordering his detention in a civil prison.

10. The other part of the learned Judge's order, namely, that part which relates to the setting aside of the sale, should not, in my opinion, be interfered with, for under the circumstances of the case it is manifest that the learned Judge did intend to issue an injunction and did in fact issue one to the effect that no part of the property, not even the share of the judgment-debtor, was to be sold. That being the position, the property was sold when it should not have been sold.

A Court always has power under the law to set aside a sale made under such circumstances, in the ends of justice. The "inherent powers" of the Court have been preserved in the CPC in order to meet such a contingency. I am therefore of the opinion that the order setting aside the sale made by the Court below should be affirmed and I accordingly affirm that part of the lower Court's order.

11. No other points were raised either by Mr. Ambika Prasad or by Mr. Asthana.

12. For the reasons given above, I partly allow this appeal by setting aside that part of the order of the Court below which relates to the detention of the appellant in civil prison for a period of five days.

13. Under the circumstances of this case I direct that the parties bear their own costs of this appeal.