
(1954) 05 CAL CK 0031

In the Calcutta High Court

Case No : Civil Revn. Case No. 1381 of 1953

Majibar Rahman Molla and Others

APPELLANT

Vs

Rahu Bux Dhali and Others

RESPONDENT

Date of Decision : 05-05-1954

Acts Referred:

Bengal Tenancy Act, 1885 — Section 174(3)

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 66, Order 21 Rule 90, Order 41 Rule 22

Limitation Act, 1908 — Section 18

Citation : AIR 1954 Cal 604 : (1956) 1 ILR (Cal) 158

Hon'ble Judges : Sen, J;Guha, J

Bench : Division Bench

Advocate : Mahendra Kumar Ghosh and Rabindra Nath Mitra, for the Appellant; C.C. Ganguly, for the Respondent

Judgement

Sen, J.—This revisional application is directed against an order of Sri M. L. Chakravarty, Additional District Judge, 24-Parganas, allowing an appeal from an order of the Munsif 2nd Court, Diamond Harbour who allowed an application for setting aside a sale, and directing that the application for setting aside the sale be dismissed. The sale in question was held in the course of a Rent Execution Case No. 1619 of 1947 on 7-4-1948 when the jots in arrears was sold for Rs. 199-1 anna. An application for setting aside the sale u/s 174(3), Bengal Tenancy Act, was filed by three of the judgment-debtors on 10-10-1950.

The petitioners alleged that the decree had been obtained collusively by suppressing summons and that all the processes in the execution case had also been suppressed and that they had come to know of the sale from a neighbour Kayem Ali Molla on 4-10-1950 and had then obtained details of the sale from the landlord's sherista and filed application for setting aside the sale shortly thereafter. The application was opposed by one of the auction purchasers Rahu Bux Dhali. The learned Munsif held that the sale proclamation and other processes including concise statements u/s 163 of the Bengal Tenancy Act had

been duly served.

He however noted that the valuation put forward in the sale proclamation was Rs. 150 whereas according to him the proper value of the suit land would be Rs. 5000/-. In view of this under-valuation the learned Munsif was inclined to hold on the basis of two Dacca Rulings, namely, the case of -- Tuli Bibi v. Aziz Ahammad" 53 Cal WN 1 DR 159 (A) and -- "Sundar Bibi v. Bhupal Chandra Roy" 55 Cal WN 3 DR 1 (B), that this was a case where the question of limitation would not arise in spite of the fact that there had been due service of processes, as the petitioners had suffered substantial injury and there was shocking undervaluation in the sale proclamation. The learned Munsif therefore passed the order setting aside the sale.

The learned Additional District Judge in appeal reversed the finding, holding that there was distinction between under-valuation which might be shocking to the conscience and fraud by suppression of processes in the execution case including the sale proclamation which tended to keep the judgment-debtors out of knowledge of the proceedings, and that it was only in the latter case that Section 18 of the Limitation Act would apply and that Section 18 of the Limitation Act would have no application merely in a case of under-valuation however shocking it might be. On that view the learned Additional District Judge reversed the order of the learned Munsif and directed that the application for setting aside the sale be dismissed.

2. The first point urged on behalf of the appellants petitioners is that the learned Additional District Judge did not go into the evidence as regards proper service or otherwise of the sale proclamation and other processes in the execution case on the ground that no notice had been given by the petitioners (respondents in the Court below) that they would challenge the findings of the lower appellate court as to the due service of the processes, and that this was a mistaken view of the law taken by the learned Additional District Judge and that the appeal should be remanded to him for proper disposal according to law.

It is true that the learned Additional District Judge made an observation that the law required that notice must be given by the respondents to the appellants that they would challenge the findings, and for that view the learned District Judge relied on the case -- Gopi Nath Das Vs. Namai Charan Das and Another, (C), and the learned Judge appears to have taken a wrong view of an observation in that ruling. It was observed in that case as follows:

"A respondent may uphold the decision of the lower court on ground other than the grounds upon which the lower court decided the case. But a respondent without giving notice to the other parties cannot claim to challenge a decision merely because he has been made a respondent in the proceeding."

From the facts of the reported case, it appears that a respondent in that case was seeking to challenge a decision of the lower court as to the extent of the interest of the particular respondent. An alteration of that decision would result

in an alteration of the effective order in the pre-emption case before the lower court. In the present case, the petitioners who were the respondents in the lower appellate court did not seek to challenge any finding which would alter the ultimate decision of the trial court, but they merely sought to challenge the finding as to due service of the processes in execution, and thus make out an additional ground supporting the decision of the trial court. In such a case no notice was necessary.

It appears however that the learned Additional District Judge also observed that the findings as to the correct service of the processes including the sale proclamation had not been attempted to be challenged before him. If that was so, it must be held that the petitioners did not suffer any prejudice by the fact that the learned Additional District Judge appears to have misconceived the meaning of the observation relied on by him in the case reported in Gopi Nath Das Vs. Namai Charan Das and Another, (C), cited above.

Moreover we have scrutinised the evidence as to the actual service of the processes. Such service was not only proved by the report of the process servers who were examined in the case on behalf of the auction-purchaser, but also by other un-controverted evidence in the case, e.g., that the petitioner No. 3 Gomer Ali was actually present in court at the date of the sale, i.e. 7-4-1948, and he wrote out the names of two of the auction purchasers in the vakalatnama filed by them on that date.

There was also the evidence that Abdul Rauf Molla, brother of petitioner No. 2 Abdul Aziz Molla, had signed the postal acknowledgment receipt accompanying one of the registered notices u/s 163, Bengal Tenancy Act, and his signature was proved and marked Ex. B.

The petitioners 1 and 2 at the hearing of the application under S, 174(3) of the B. T, Act no doubt alleged that the petitioner No. 3 Gomer Ali Naskar had been won over by the auction purchasers and that with Gomer Ali, petitioner No. 2 Abdul Aziz had a long standing dispute; but the learned Munsif rightly observed that if there had been such a long standing dispute between Abdul Aziz and Gomer Ali, Abdul Aziz would never have invited Gomer Ali to join him in filing the application for setting aside the sale; and it was only when it was discovered that Gomer Ali was actually present at the time of the sale and had written the names of some auction purchasers that Abdul Aziz tried to discredit him by alleging enmity with Gomer Ali Naskar.

It must be held therefore that there was no fraud in the case by way of suppression in the sale proclamation, concise statements and other processes and there is therefore no question of sending the case back to the trial court for decision on the point. It is no doubt curious that a judgment-debtor should have written out the names of two persons who wanted to bid at the sale, in the vakalatnama filed by the latter; but no allegation was made by the petitioners that the auction-purchase was made on behalf of some judgment-debtors, and

there was no material to show collusion on the part of Gomer leading to suppression of processes.

3. The next point urged on behalf of the petitioners is that the Dacca Rulings on which the learned Munsif relied are based on a Ruling of the Privy Council in the case of -- AIR 1945 67 (Privy Council) and that the effect of this Privy Council Ruling was not considered by the learned Additional District Judge. In the Privy Council case the details of the mortgage subject to which the property was to be sold were erroneously entered in the sale proclamation. The claim under the mortgage was shown in the sale proclamation of Rs. 80000/- whereas it should have been Rs. 67000/-. There was a finding that on account of this error the property had been sold at a relatively lower value. The Privy Council observed as follows,

"Where a sale takes place at a serious undervalue occasioned by failure on the part of the Court and of the decree-holder to carry out the obligations stated above correctly specifying certain particulars which are required to be specified in the proclamation for sale under Order 21, Rule 66(2), the case falls within the language of Order 21, Rule 90, and the sale must be set aside when the judgment-debtor has suffered injury thereby, although the decree-holder may not be guilty of fraud and however dilatory the judgment-debtor may have been provided there has been nothing on his part to constitute waiver."

In connection with this Privy Council Ruling it may be pointed out that their Lordships were not considering the question of limitation. The point urged appears to have been that in spite of a mis-description of the details as to mortgage in the sale proclamation the judgment-debtor knew the actual state of things and there must be deemed to have been a waiver by the judgment-debtor inasmuch as he did not take steps to correct the mis-description. Their Lordships of the Privy Council held that the case would come within the language of Order 21, Rule 90 of the CPC because it would be a case of material irregularity in publishing or conducting a sale and the question of waiver of the judgment-debtor would not arise in the case.

Their Lordships did not consider the question of limitation at all and it would be unsafe to rely upon this ruling as holding that their Lordships supported the view that irrespective of the question of limitation and irrespective of section 18 of the Limitation Act, such an error in the sale proclamation would always enable the judgment-debtor to set aside the sale. Moreover the language of Order 21, Rule 66 and Order 21, Rule 90 of the CPC has to a certain extent been amended by Calcutta. The Calcutta High Court has added the following proviso (ii) to Order 21, Rule 90,

"Provided that no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up, unless objection was made by him at the time in

respect of the defect relied upon."

4. There is no corresponding addition to Order 21, Rule 90 by the Madras High Court and it would therefore appear that if the case had arisen from a decision of the Calcutta High Court the decision of the Privy Council would have been different. In the circumstances this Privy Council Ruling cannot be regarded as an authority contrary to the established line of rulings of the Calcutta High Court where the view has been taken that mere under-statement in the valuation of sale proclamation does not amount to such fraudulent concealment as would bring the case within the scope of Section 18 of the Limitation Act.

In this connection reference may be made to the case of -- "Sarat Chandra Dey v. Abdul Kaiyam" 49 Cal WN 731 (E) which was a case decided on the 17th July 1945, after the date of the Privy Council decision and after the publication thereof in the Calcutta Weekly Notes and other Law Journals. In 49 Cal WN 731 (E) it was held that mere under-statement of price in the sale proclamation did not amount to fraudulent concealment within the scope of section 18 of the Limitation Act.

5. Moreover as relief is sought against the auction purchaser, there must be some evidence to show that the auction purchaser was guilty of such fraudulent concealment as tended to keep the petitioner out of knowledge of the sale. The learned Advocate for the petitioners had contended that fraud by the auction purchaser does not need to be proved and that in order to attract the operation of Section 18 of the Limitation Act it is sufficient to show that there was fraud on the part of the decree-holder. In this connection he has referred to a ruling of Mukherjea J. in the case of -- "Mahipati Halder v. Atul Krishna AIR 1949 Cal 212 (F). It is true that Mukherjea J. held that Section 18 of the Limitation Act can be availed of to extend the period of limitation where fraud had been proved to have been committed by the decree-holder although the auction-purchaser who was a stranger was not a party or accessory to the fraud. This, however is a Single Bench ruling and this was disapproved by a Division Bench in a subsequent case, namely, -- Mihirlal Vs. Panchkari Santra and Others, (G), where it was held as follows,

"Before any extension of time can be granted u/s 18 of the Limitation Act in an application for setting aside a sale u/s 174(3) of the Bengal Tenancy Act it must be proved that the auction purchaser -- a person not claiming through the decree-holder was either guilty of the fraud or accessory to the fraud that prevented the judgment-debtor from knowing of the sale."

In view of the wording of Section 18 of the Limitation Act, we must respectfully agree with the Division Bench ruling cited above.

6. In the present case, no such fraud on the part of the auction purchaser was sought to be proved. In view of the findings already recorded as to the proper service of sale proclamation and other processes it must be held that there was also no fraud established on the part of the decree-holder. It is therefore clear

that the petitioner cannot get advantage of Section 18 of the Limitation Act to extend the period of limitation and therefore the learned Appellate Court was quite right in holding that the application for setting aside the sale was barred by limitation and could not succeed.

7. This application therefore fails and the Rule is discharged. It is however ordered that the parties will bear their own costs in this Rule.

Guha, J.

8. I agree.