
(2012) 01 PAT CK 0062
In the Patna High Court
Case No : Second Appeal No. 355 of 1988

Most. Etwariya

APPELLANT

Vs

Shankar Dusadh

RESPONDENT

Date of Decision : 17-01-2012

Acts Referred:

Citation : (2012) 01 PAT CK 0062

Judgement

V. Nath, J.—Heard Mr. Bishwanath Choudhary, the learned counsel appearing on behalf of the appellant and also Mr. Bhanu Pratap Singh, the learned counsel for the respondent.

2. The present second appeal has been filed by the plaintiff (now deceased through her L.R.) against the judgment and decree dated 27.05.1988 passed by Sub Judge I, Aurangabad in T.A.No. 44/76 upholding the dismissal of the suit.

3. Shorn of unnecessary details, the plaintiff has filed the suit mainly for declaring her as Raiyat of the suit land and for declaration that the defendant has acquired no right, title or interest on the basis of auction sale which is illegal and void, and for recovery of possession. The plaintiff's case is that the lands in dispute had been recorded in equal shares in the names of Laxman Dushadh and Lachhu Dushadh who were in possession as separate members of the family. The plaintiff has claimed to have inherited the 8 annas share therein as deceased son's wife of Lachhu Dushadh. It is the case of the plaintiff that the defendant, claiming to have purchased the suit land through auction sale in Execution Case No. 152/58 on 23.11.61 and to have obtained delivery of possession on the same date i.e. 23.11.61, dispossessed her on 25.11.61 from the suit land on the strength of the delivery of possession. It is the further case of the plaintiff that she is an illiterate village woman and the defendant, by perpetrating fraud, succeeded in dispossessing her on the pretext that all her properties had been auction sold. However, after some years the plaintiff could learn that her lands had not been sold as alleged by the defendant and the defendant had come in wrongful possession of her lands. Further, the plaintiff has also stated that she

belonged to a backward class and the court had no jurisdiction to sell her land in execution and any such sale in execution case was void and illegal. It has also been alleged that the auction sale is illegal in for want of notice and also under the provisions of Money Lenders Act as well as due to misdescription of the sold land.

4. Per contra, the defendant's case, in short, is that he obtained the decree for money in SCC Suit No. 286/21/1957 in respect of loan taken by the husband of the plaintiff and, in execution whereof, the suit land had been sold and the defendant as auction purchaser obtained delivery of possession on 23.11.68 over the same and since then he has claimed to be continuing in possession. The defendant has denied the allegation of perpetrating fraud in getting the property auction sold and has also made assertion that the suit is barred u/s 47 C.P.C. and also under Order 21 Rule 92 C.P.C. On these main pleadings the defendant has prayed for dismissal of the suit.

5. The trial court, after considering the pleading and evidence of the parties, came to the finding that the defendant did not dispossess the plaintiff from the suit land by exercising fraud, but also held that the auction sale of the suit land in execution proceeding was void and without jurisdiction in view of Section 49(M) of B.T. Act. However, after concluding that the suit was barred u/s 47 and Order 21 Rule 92 C.P.C. as well as res judicata and limitation, it dismissed the suit

In appeal, the appellate court formulated the following three points for determination in view of the submissions of the parties:

(i) Whether the defendant respondent has got the suit land auction sold by suppressing the process and by playing fraud upon the court and whether the auction sale is nullity?

(ii) Whether the suit of the plaintiff is maintainable and whether the plaintiff appellant is entitled to a decree?

(iii) Whether the judgment and decree of the lower court is bad and liable to be set aside?

6. After considering the evidence, pleadings and rival submissions of the parties, the appellate court below concurred with the finding of the trial court that the execution proceeding was without jurisdiction and auction sale therein was void as the executing court was not competent to pass the order for sale of the suit land of the plaintiff. But it reversed the finding of the trial court that the suit was barred by res judicata and has held that the defendant had duped the court and had perpetrated fraud upon the court in getting suit land auction sold in the execution proceeding. However, the appellate court has also held that, in view of the bar of Section 47 C.P.C., the separate suit was not maintainable for declaring the auction sale as void and for recovery of possession. It has further held that even after treating the present suit as a petition u/s 47 C.P.C., it would still be barred by limitation in view of Article 137 of Indian Limitation Act prescribing

three years for recovery of possession from the date of delivery of possession as it has been filed after lapse of about 7 1/2 years from that date. Consequently, the appeal has been dismissed.

7. By order dated 19.11.1990 this second appeal was admitted for hearing and the following substantial questions of law were formulated for determination:

(i) Whether a sale in contravention of the provisions of Section 49(M) of the B.T.Act is void and without jurisdiction?

(ii) Whether in such a case Article 137 of the Limitation Act will apply?

8. Learned counsel for the appellant has submitted that, in view of its finding that the auction sale was void and without jurisdiction and had been obtained by practising fraud upon the Court, the appellate court below has grossly erred in law in dismissing the suit as barred by limitation. It has been urged that the possession, having been wrongfully taken on the strength of an auction sale which has been found to be void, the suit for recovery of possession by the title holder will be governed by Article 65 of the Limitation Act which prescribes the limitation for 12 years from the date of dispossession. Relying on the decision of the apex court in State of Maharashtra Vs. Pravin Jethalal Kamdar (Dead) by Lrs., , it has been submitted that when a sale is void, the declaration for the same as such is inconsequential and the suit is, in fact, a suit for recovery of possession on the strength of title and Article 137 will have no application. With regard to the bar envisaged u/s 47 C.P.C., the learned counsel has submitted that the said bar is applicable only when the executing court, acting within its jurisdiction, has committed illegality or irregularity in execution of the decree. It has been contended that when the execution proceeding and auction sale made therein have been found to be without jurisdiction and void, the bar will not come in the play and the suit will be maintainable.

9. On the other hand, the learned counsel appearing for the respondent has submitted that the bar u/s 47 C.P.C. was clearly applicable and the suit having been filed much after the prescribed period of limitation of 3 years from dispossession, the same is barred by limitation. It is the contention of the learned counsel that, in case of challenge to auction sale, the suit is governed by the provision of Article 137 of the Limitation Act and for this submission the reliance has been placed on the decision of the apex court in Merla Ramanna Vs. Nallaparaju and Others, and the full bench decision of this Court in Baijnath Prasad Sah Vs. Ramphal Sahni and Another, . It has also been submitted that in view of the principles laid down in the decision of the apex court in the case of National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, and Pyare Mohan Lal Vs. State of Jharkhand and Others, , the law laid down in Merla Ramanna Vs. Nallaparaju and Others, should be followed as the same had been delivered by a three Judges Bench whereas the decision in State of Maharashtra Vs. Pravin Jethalal Kamdar (Dead) by Lrs., has been delivered by a bench of two Hon"ble Judges.

10. The perusal of the judgments of both the courts below and the submissions made on behalf of the learned counsels for the parties, it is pellucid that the suit has been filed basically for declaration of title and recovery of possession over the suit land alongwith the relief for declaration of the auction sale in the execution proceeding as illegal, inoperative and void. Both the courts below, after considering the provision of Section 49(M) of the Bihar Tenancy Act have recorded specific finding that the executing court was not competent to pass the order for sale of the suit land and the entire proceeding of the execution was, thus, without jurisdiction in view of Section 49(M) of B.T.Act. It has, further, also been categorically held by the appellate court below that the decree holder-respondent had perpetrated fraud upon the court in getting the suit land auction sold in the execution proceeding. On the basis of these findings the appellate court below has concluded that the auction sale of the suit land was without jurisdiction and void. The concurrent findings of both the courts below, that the execution proceeding for sale of the suit land was without jurisdiction and the auction sale is void, have not been challenged by the respondent in this appeal but the specific stand taken by the learned counsel for the appellant is that, even in view of these findings and conclusions, the suit is barred u/s 47 C.P.C. followed by the bar of limitation under Article 137 of the Indian Limitation Act and appellate court below has correctly dismissed the appeal holding the suit to be barred by limitation.

11. Once it is accepted that the executing court lacked jurisdiction to proceed with the execution proceeding for sale of the suit land and the auction sale of the suit land therein was void, the point for determination arises as to whether the suit would still be barred by Section 47 C.P.C. and Article 137 of the Indian Limitation Act would be applicable. For determining this question the distinction between complete absence of jurisdiction in a court to execute a decree by passing the order for sale of the suit land on one hand and execution of a decree in irregular or illegal exercise of jurisdiction will have to be appreciated. In a case where the court lacks inherent jurisdiction to pass a decree or order, it is *coram non jure* and any decree or order passed by such a court would be void *ab initio*. The Hon'ble Supreme Court in the case of *Dhurandhar Prasad Singh Vs. Jai Prakash University and Others*, has considered the several facets of the expression void and after taking notice of the decision in *Marshalsea case (1613)*¹⁰ Co. Rep. 68b, has quoted the relevant portion from the said decision as under:

... When a court has jurisdiction of the cause, and, proceeds *inverso ordine* or erroneously, there the party who sues, or the officer or minister of the Court, who executes the precept or process of the Court no action lies against them. But when the court has not the jurisdiction of the cause, there the whole proceeding is *coram non jure* and actions will lie against them without any regard of the precept or process ...

Their Lordships have, thereafter, observed as follows:-

... One type of void acts, transactions, decrees, are those which are wholly without jurisdiction, ab initio void and avoiding the same no declaration is necessary, law does not take notice of the same and it can be disregarded in collateral proceeding or otherwise...

12. By Section 49(M) of the Bihar Tenancy Act, the jurisdiction of the executing court to sell the property belonging to a member of scheduled caste has been completely taken away. The plaintiff admittedly belonged to the scheduled caste and the suit land belonging to the plaintiff could not have been auction sold in execution and such sale being against the statutory provision is nullity. As such, the suit filed by the plaintiff for declaration of title and recovery of possession and alongwith the relief for declaration of the auction sale of the suit land in the execution proceeding as void cannot be said to be barred u/s 47 C.P.C. The issues arising in the suit on these facts cannot be said to be the issues relating to the execution, discharge and satisfaction of the decree as envisaged in Section 47 C.P.C., the applicability of which presupposes the existence of jurisdiction in the executing court to execute the decree and auction sale the suit land. Appreciating this aspect in *Kishan Lal Vs. Har Prasad*, , their lordships have observed that "a sale attended with an irregularity is quite distinct from a sale that is null and void, the former exists and is in force so long as it is not set aside, whereas the later does not exist in the eye of law at all". From the facts of this case also it is apparent that the plaintiff has not challenged the auction sale of her property on the ground of irregularity or illegality committed by the executing court, and simultaneously also the findings and conclusions of the courts below disclose that the executing court had no jurisdiction at all to execute the decree and sell the suit land in auction against the statutory prohibition. While considering the scope of Section 47 C.P.C., a special bench of this Court in *Baleshwar Chaubey Vs. Ram Ranavijaya Prasad Singh and Others*, has observed as follows:-

...Confusion is apt to arise in not keeping in mind the distinction between complete absence of jurisdiction in a court to pronounce judgment or to execute a decree and where a court in the undoubted exercise of its jurisdiction proceeds to act irregularly or even illegally in direct violation of the provisions of a statute...

(Emphasis supplied)

13. Thus it is held that the bar of Section 47 C.P.C. could not be applicable to the suit in the facts of this case and it was not at all necessary, as held by appellate court, to treat the suit as a petition u/s 47 C.P.C. Consequently the provision of Article 137 of the Indian Limitation Act will also not apply.

14. Learned counsel for the respondent has placed reliance upon the decision of the apex court in *Ramanna's* (Supra) for buttressing his submission that Section 47 C.P.C. would be applicable to the facts and circumstances of the case and Article 137 of the Indian Limitation Act shall be attracted. However, in the said

case, the apex court was considering the applicability of Section 47 C.P.C. and the provisions of Limitation Act, in a case where the sale of the properties in execution of the decree was in excess of what the decree had directed. In the facts of that case, it was contended before the apex court that the sale was void and the plaintiffs were entitled to the recovery possession of those properties ignoring the sale and it was under those facts that their Lordships have held that "...When a sale in execution of a decree is impugned on the ground that it is not warranted by the terms thereof, that question could be agitated when it arises between the parties to the decree only by an application u/s 47, Civil P.C. and not in a separate suit..." The ratio of that case cannot be applied to the facts of this case where the executing court lacked jurisdiction to sell the suit land in execution of the decree. To the contrary the Hon"ble Supreme Court in the matter of Kiran Singh and Others Vs. Chaman Paswan and Others, has held as follows:-

...It is fundamental principle, well established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings...

15. The reliance has also been placed on behalf of the respondent on the full bench decision of this Court in case of Baijnath Prasad(Supra) but in this case their lordships were considering the applicability of the principle of constructive res judicata in the case of an objection filed u/s 47 and 151 of the Code of Civil Procedure. The question whether a separate suit for declaration of title and recovery of possession after declaring the auction sale in execution as void was neither raised nor decided in this decision. However, this question directly arose for consideration before the full bench in Ram Lochan Vs. Mahadeo Prasad Singh and Others, and it has been laid down in this decision that in a case where the executing court lacks jurisdiction to attach and auction sale the judgment debtor's immovable property, the execution proceeding alongwith sale are null and void and it is not necessary for the judgment debtor to raise any objection in execution u/s 47 C.P.C. and separate suit for the purpose would not be barred.

16. Taking in view the another aspect of the matter, the appellate court has also recorded the finding that the defendant had duped the Court and perpetrated a fraud upon the Court in getting the auction sale of the suit land. The law is no longer res integra with regard to the result of the fraud and a decree or order obtained on that basis, and the principle has been laid down in clear terms that the fraud vitiates even the most solemn act. It would be apt here to quote the observation of the apex court in the case of Ramchandra Singh Vs. Savitri Devi 2003 (4)PLJR 2008 (SC). :

An act of fraud on court is always viewed seriously a collusion or conspiracy with a view to deprive the rights of the others in relation to property could render the transaction void ab initio...

17. In view of the aforesaid legal principles and the discussions, it is held that the sale of the suit land in execution case was void ab initio and nullity and the suit filed by the plaintiff is not barred u/s 47 C.P.C. As such it is also held that the suit has been wrongly held to be barred under Article 137 of the Limitation Act.

18. The learned counsel appearing on behalf of the respondent has referred to the two decisions of the apex court in National Small Industries Corporation Ltd. (supra) and Pyrey Mohan Lal (supra) and relied upon the same for advancing the proposition that the judgment of the apex court in Ramanna's case (supra) having been rendered by a larger bench should be followed in place of the judgment of the apex court in State of Maharashtra Vs. Pravin Jethalal Kamdar (Dead) by Lrs., . As held above principles laid down in Ramanna's case (supra) is not applicable to the facts and circumstances of this case rather the ratio of the decision in State of Maharashtra Vs. Praveen Jethalal Kamdar (supra) is applicable to the facts and circumstances of this case. In this decision the apex court has laid down as follows:-

...Thus, it has not been and cannot be disputed that the order dated 26th May, 1976, was without jurisdiction and nullity. Consequently, sale deed executed pursuant to the said order would also be a nullity, it was not necessary to seek a declaration about the invalidity of the said order and the sale deed. The fact of plaintiff having sought such a declaration is of no consequence. When possession has been taken by the appellants pursuant to void documents, Article 65 of the Limitation Act will apply and the limitation to file the suit would be 12 years...

19. In the present case also the plaintiff has filed the suit for recovery of possession over the suit land on the basis of her title and the relief with regard to the sale of the suit land in execution case, though also prayed, would be of no consequence. Such a suit will be governed by Article 65 of the Limitation Act and the limitation for filing the suit will be twelve years from the date of dispossession i.e. 23.11.61 on which date the defendant has claimed to have obtained delivery of possession through the executing court. The suit has been filed in the year 1970 and is thus well within limitation.

20. For the foregoing reasons and discussions, the substantial questions of law are, accordingly, answered in favour of the appellant. It is held that both the courts below have wrongly decided the issue of the bar of the suit u/s 47 C.P.C. and have wrongly held, thus, that the suit filed by the plaintiff was barred by limitation. The second appeal is, allowed and the impugned judgment and decree of both the courts below are, accordingly, set aside and the plaintiff is held entitled to the decree as prayed in the suit.