

(1968) 01 BOM CK 0005
In the Bombay High Court
Case No : A.F.A.D. No. 352 of 1960

Motilal Hirachand Marwadi

APPELLANT

Vs

Sadabai and Others

RESPONDENT

Date of Decision : 30-01-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, Order 21 Rule 69, Order 21 Rule 83, Order 21 Rule 89, Order 21 Rule 90

Citation : AIR 1970 Bom 67 : (1969) 71 BOMLR 172 : (1970) ILR (Bom) 37 : (1969) MhLj 398

Hon'ble Judges : Nain, J;Chitale, J

Bench : Division Bench

Advocate : M.L. Pendse, for the Appellant; G.N. Vaidya and G.S. Gupte and S.M. Mhamane, for Mina Bal, for the Respondent

Judgement

Chitale, J.—The facts giving rise to this appeal, briefly stated, are as follows:

2. In Civil Suit No. 131 of 1923 money decree was obtained against Ratanchand Walchand and Hirachand Gambhirmal. It is not disputed that the decree was a joint and several decree against both these judgment-debtors. In execution of that decree, auction sale in respect of the property involved in the present suit was held on 23rd March 1944. The sale was confirmed on 14th October 1944. For some reasons which are not clear on record, the sale certificate was issued as late as 18th March 1953. It is not disputed that judgment-debtor Ratanchand Walchand died on 6th March 1935 i.e., long before the auction-sale in question was held. Judgment-debtor Hirachand Gambhirmal died on 21st April 1944 i.e. after the auction-sale in question, but within 30 days thereof. The plaintiff Manikchand Daulatram Bora filed the present suit on 10th August 1956 to recover possession of the three houses which are the subject-matter of the present suit on the basis of the sale certificate issued to him.

3. Defendant Motilal Hirachand Mar-wadi, who is the son of above-mentioned judgment-debtor Hirachand, by his written statement, Exhibit 10, contends that

the suit is bad for want of necessary parties, it is barred by limitation, the debt for which the property was sold was avyavaharik. i.e. illegal and immoral, hence not binding on him, the decree in execution of which the sale was held is not binding on him as he was not a party to the suit, since he was not brought on record as Hirachand's heir in the execution proceedings, the auction sale is not binding on him, and the present suit for possession is, therefore, not tenable.

4. The learned trial Judge held that the auction-sale in question was not binding on the defendant, inasmuch as he was not brought on record on the date of confirmation of the sale. In view of this finding, he dismissed the plaintiff's suit with costs. It may be mentioned here that the defendant's contentions that the debt for which the decree was passed was avyavaharik, that the suit was not tenable for want of necessary parties, were not pressed in the trial Court. Although the plea of limitation was taken in the written statement, no specific issue on that point was asked for in the trial Court.

5. The plaintiff preferred an appeal to the District Court, Ahmednagar. The learned Assistant Judge, who heard the appeal, held that the auction-sale in question was legal and valid inasmuch as judgment-debtor Hirachand was alive on the date of the sale, the fact that the heirs of the other judgment-debtor Ratanchand were not brought on record did not matter as the decree in execution of which the auction-sale was held was a joint and several money decree, and the fact that on the date of the confirmation of the auction-sale the present defendant was not brought on record as the legal representative of deceased judgment-debtor Hirachand did not vitiate the auction-sale. In view of these findings, he allowed the appeal, set aside the decree of the trial Court and decreed the plaintiff's claim.

6. In this second appeal, Mr. Pendse for the defendant contends that the view taken by the trial Court is correct and that of the lower appellate Court is wrong. Mr. Pendse invites our attention to Sir Dinshah Mulla's Commentary on Civil Procedure Code, Vol. I, 13th Edition, page 262. The learned author mentions that under the present Code of 1908 the words "fully satisfied" have been substituted for the words "fully executed". Mr. Pendse further relies on, the learned author's observations at page 263 which are to the effect that the expression "fully executed" gave rise to the question as to when a decree could be said to be "fully-executed". The learned author then refers to the conflicting decisions and observes:-

"It was to remove this conflict of decisions that the word "satisfied" has been substituted in the present section for the word "executed". The effect of this alteration in the language is to supersede the Allahabad decisions in so far as they hold that after attachment it was not necessary to bring the legal representatives on the record, for a decree cannot be said to be fully "satisfied" merely because the property was attached".

7. Sub-section (1) of Section 50 of CPC 1908, reads thus:--

"50. (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased".

8. In our opinion, Section 50(1) merely enables the decree-holder to apply to, the Court which passed the decree to bring the judgment-debtor's heirs on record, if he dies before the decree is fully satisfied, and may also pray for execution against the legal representatives. The decree-holder may continue the same execution application or may get it dismissed and file another execution application against the legal representatives of the deceased judgment-debtor. It is, however, important to note that it is only the Court that passed the decree under execution that can bring the judgment-debtor's legal representatives on record and can initially order execution against them, and then if necessary transfer the decree to another Court for execution. The observations of the learned author relied upon by Mr. Pendse do not touch the point which we are required to decide. The material point that arises for our consideration is: If in execution proceedings certain property belonging to a judgment-debtor was sold when he i.e. judgment-debtor was alive and was a Party to the execution proceedings, but if that sale was subsequently confirmed after the judgment-debtor's death, without bringing his legal representatives on record, is such sale invalid and not binding on the judgment-debtor's legal representatives? Order 21, Rule 92 of CPC provides that where no application is made under Rule 89, Rule 90 or Rule 91 of Order 21 or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute. On the wording of this rule, it is quite clear that a statutory duty is cast on the Court to confirm a sale held in execution proceedings, if no application to set aside that sale is submitted under Rule 89, 90 or 91 of Order 21, and also if such an application is made and disallowed. Sir pinshah Mulla in his commentary under Order 21, Rule 92 at page 1193, Civil Procedure Code, Vol. II, observes:--

"Confirmation of sale under this rule does not require an application by the auction-purchaser. It is a statutory duty cast on the Court, and if an application is filed, it is not subject to any limitation."

9. In the relevant foot-note, two Madras decisions are referred to. They are Veda Goundar v. Arunachallam AIR 1958, Mad. 317 and Lakshmi Ammal v. Thangaraju Padayachi AIR 1958 Mad. 396. Mr. Pendse for the defendant does not challenge the correctness of this pro-Position. He, however, points out that there is difference of opinion as to the legality of an auction-sale confirmed without bringing legal representatives of the judgment-debtor on record. Our attention is invited to Kamakhya Dutt Ram v. Shyam Lal AIR 1929 Oud 235, particularly to the observations at page 237. The facts in this decision were similar to those in the present case. The relevant observations are at page 237, and they are as follows:--

"The sale had taken place in the lifetime of the judgment-debtor and there are

no provisions in the CPC which require legal representatives of a judgment-debtor, who has died after the sale, to be brought on the record for the purposes of confirmation. The case may be different if a judgment-debtor dies before the date of the sale and the sale taken place behind the back of his representatives, but we express no opinion on that point. It may be mentioned that the Deputy Commissioner had directed the issue of notice to the representatives of the deceased judgment-debtor under his order dated 11th November 1925 (Exhibit 6). Unfortunately notice was not served. This fact, however, does not affect the validity of the confirmation."

In addition to the reasoning given in the above quotation, we may state that an auction-purchaser gets his title because of the auction-sale itself, and not because of the confirmation. It is true that the title which an auction-purchaser at a Court-sale gets is in a sense contingent, because it is subject to confirmation of the sale, but it cannot be said that he gets title because of the confirmation. Considering the provisions of Order 21 of Civil Procedure Code, it is clear that once an auction-sale is validly held, the auction-purchaser is not required to submit an application to the Court praying for confirmation of the sale. In other words, no legal duty is cast on the auction-purchaser to apply for confirmation. Rules 89 and 90 of Order 21 CPC merely give a judgment-debtor an opportunity to have the sale set aside on depositing in the executing Court the amount mentioned in rule 89 or to challenge the validity of the sale, if he desires to challenge it, on the ground mentioned in Rule 90. As already pointed out, a statutory duty is cast on the Court to confirm a sale, if the same is not set aside by an application under Rule 89 or 90 or 91 of Order 21 of Civil Procedure Code. In view of this legal position, no representation for the judgment-debtor's property is necessary at the stage of confirmation of a court sale. It is a well-established principle that where execution proceeds against the property of a judgment-debtor and any substantive step affecting the interest of the judgment-debtor in such property is taken in execution proceedings, there must be proper representation for the property of the judgment-debtor, but once the sale has taken place, there seems to be no principle on which it can be said that such representation is necessary at the stage of confirmation of the sale, which must follow as a matter of course, if the judgment-debtor does not challenge the sale by taking suitable steps or the sale is not otherwise set aside under Rule 89 or 91 of Order 21, Civil Procedure Code. It cannot, therefore, be said that a court-sale, which is properly held while the judgment-debtor himself was on record, but died after the sale and his legal representatives were not brought on record at the time of the confirmation of the sale, is not valid.

10. Mr. Pendse for the defendant relies on *Arunachala Chettiar Vs. Vadla Koundan and Others*, . In this case also, the facts are similar to the facts of the present case. The learned Judge observes:--

"The position of purchaser after the sale and before the confirmation is that he has only a sort of inchoate interest which might become a vested interest in the

property after confirmation".

11. Mr. Pendse relies on these observations to contend that the auction-purchaser gets no title until the sale is confirmed. We are unable to accept this contention. In our opinion, it would be more accurate to say that an auction-purchaser gets title by the auction-sale, but it remains contingent until the sale is confirmed. In the above-mentioned Madras decision, the learned Judge relies on Order 21, Rule 92(3), CPC to hold that an auction-sale cannot be confirmed in the absence of the legal representatives of the judgment-debtor. He observes:--

"In my opinion an answer to the question raised by the learned Advocate for the appellant that the judgment-debtor's legal representatives are not necessary parties to a confirmation of sale is met by the language of Order XXI, Rule 92(3). Under that sub-clause a suit to set aside an order made under rule 92 shall not be questioned in a suit by any person against whom such an order is made is significant as indicating that if even an order of confirmation is made under Rule 92(1), it must be an order made against a person which implies that the confirmation order is made against the judgment-debtor or in case of his death, against his legal representatives. The very object of that rule is to prevent the judgment-debtor, and in case he dies, his legal representatives, from agitating the question of the finality of the sale in a later proceeding and to compel them to take proceedings under Rule 89 or 90 in cases in which the money is deposited on the requirements of Rule 90 are satisfied. The decision of the Oudh Court, overlooked, in my opinion, the language of clause (3) of Rule 92."

11-A. With respect, we are unable to agree with this reasoning. As already pointed out. Rules 89 and 90 of Order 21. CPC confer on a judgment-debtor the right to have the sale set aside either by payment of the necessary amount or by challenging the sale on the ground of material irregularities and/or fraud, but if the judgment-debtor fails to exercise the right conferred by these rules, confirmation of sale must follow as a matter of course. Neither the decree-holder, nor the auction-purchaser is required to take any step or to obtain any judicial order of the executing Court in order to have the auction-sale confirmed. It is because of the above right which is conferred on the judgment-debtor that he is precluded from challenging the validity of the sale by a substantive suit. Sub-rule (3) of rule 92 does not, in our opinion, indicate in any way that because the confirmation of an auction-sale precludes the judgment-debtor from subsequently challenging the sale by a suit, it necessarily follows that the order confirming the sale cannot be passed unless the legal representatives of the judgment-debtor, who was alive at the date of the sale, are brought on record before the order confirming the sale is passed. As already pointed out, while confirming a court-sale the executing court does not pass any further judicial order adversely affecting the judgment-debtor's interest but it merely discharges a statutory duty and records a legal consequence that must follow. Sub-rule (3) of Rule 92 also merely mentions the legal position arising on confirmation of a court-sale. It is urged that the legal representatives of the deceased judgment-

debtor may not be aware of the auction-sale held against the judgment-debtor. That may or may not be so, but that would not-confer any, additional right on the legal representatives of the judgment-debtor -- any higher rights than those of the judgment debtor himself.

12. In the above-mentioned Madras decision, the learned Judge further proceeds to observe that there are decisions to the effect that before an auction-sale is confirmed, the interest of the judgment-debtor can be attached by other decree-holders. In view of this, the learned Judge observes:--

"The confirmation order therefore has got a double operation of divesting the judgment-debtor of his title in the property and vesting it retrospectively in the auction purchaser to take effect from the date of the sale."

13. In our opinion, it would not be correct to say that the title of the judgment-debtor passes on to the auction-purchaser on the date of the confirmation of the auction-sale. It may be that decree-holders other than the decree-holder who has brought the property to sale may attach the judgment-debtor's interest, whatever it is. because in case the auction-sale is set aside, such attachment may be effective. That would not, however, have any bearing on the Question of the validity of the sale. The validity of a Court-sale must depend upon whether at the stage of confirmation in the case of such a sale validly held representation for the judgment-debtor's estate is necessary. As pointed out above, confirmation must follow as a matter of course, if the judgment-debtor does not choose to challenge the sale or have it set aside on paying the necessary amount. It is for the judgment debtor or his legal representatives to exercise the above right to have the sale set aside within the time provided by law and on failure to exercise that right, confirmation of sale must follow as a matter of course and whether the legal representatives of the judgment-debtor were brought on record before confirmation of the sale or not would be immaterial, representation for the estate being unnecessary merely for confirmation of sale, that being in such cases a legal consequence that must follow.

14. In the above-mentioned Madras decision, at page 872 the learned Judge observes:--

"In a case where the judgment-debtor or his legal representatives are parties to the proceedings they would undoubtedly be aware of the sale and within the period of limitation provided by law, namely, thirty days, they would be in a position to take steps to have the sale set aside either by deposit of the money, or if the sale was vitiated by irregularities, by an application under Order XXI, Rule 90".

15. In our opinion, the mere fact that the legal representatives of a judgment-debtor, who was alive and a party to the execution proceedings at the date of the auction-sale, may not be aware of that sale would not affect the legal position. Legal consequences in respect of any right or property do not cease to follow because of such ignorance. The legal representatives step into the shoes of the

judgment-debtor, they have to exercise their legal rights within the period of limitation and ignorance as to the rights and liabilities of their predecessor cannot be a ground to hold that the legal representatives of such a judgment-debtor would be necessary parties at the date of the confirmation of the auction sale held while the judgment-debtor was a party to the execution proceedings. Once that period of limitation begins to run, it would not stop merely by the death of the judgment-debtor.

16. Mr. Pendse referred to the Full Bench decision of Calcutta High Court in *Smt. Shanti Devi Vs. Khandubala Dasi and Others*, . This decision is distinguishable on facts. In that case, the judgment-debtor died after the issue of the proclamation of sale, but before the date of the sale itself. Reliance is placed on the observations at page 178, (of Cal. W.N.) = (at p. 340 of AIR) which are as follows:--

"A court sale of the property of the judgment-debtor after his death without implicating his legal representative does not bind the representative, at whatever stage of the execution proceedings the judgment-debtor might have died and irrespective of whether the sale was in execution of a money decree or a rent decree or a final decree for sale in a mortgage suit. Such a sale does not bind his representative where the death takes place after the commencement of the proceedings for execution of a money decree."

17. In our opinion, there is a good deal of difference in an auction-sale held without bringing the judgment-debtor's heirs on record and an auction-sale held with the judgment-debtor on record to represent the estate, but merely confirmed after his death without bringing his legal representatives on record. At the date of sale, which is a substantive step in execution, representation for the estate of the judgment-debtor is essential and absence of such representation will affect the validity of the sale, but such representation is not, in our opinion, necessary for mere confirmation of an auction-sale otherwise validly held.

18. The learned appellate Judge relied on *Aba Khesaji v. Dhondabai* ILR (1895) Bom. 276, *Sheo Prasad v. Hiralal* ILR (1890) All. 440, and *Abdur Rah-man v. Shankar* ILR (1895) All. 162. Mr. Pendse refers to Sir Dinshah Mulla's commentary, on Civil Procedure Code. u/s 50, and points out that these decisions may not be said to lay down the correct law after the amendment to Section 50, These decisions go to the extent of holding that if the property was properly attached with notice to the judgment-debtor, subsequent proceedings in execution could not be held to be void even if the judgment-debtor dies subsequent to the attachment and his legal representatives are not brought on record. In the present case, we need not go to that length. On the facts stated above, It is clear that the judgment-debtor did re-present his estate at the date of the sale. The learned trial Judge relied upon *Shankar Daji v. Dattatraya Vinayak* ILR 45 Bom. 1186; AIR 1921 Bom. 385, *Kanchanmalai Pathar v. Shahaji Raia Sahib* ILR 59 Mad. 461 AIR 1936 Mad. 205, and *Ajab Lal Dubey and Another Vs. Hari Charan Tewari @ Hari Tewari and Others*, . As the lower appellate Court

points out. these cases are distinguishable on facts. During arguments, Mr. Pendse further referred to ILR 59 Mad. 461 : AIR 1936 Mad. 205, and *Annie Marie Fernandez v. Matheran Madhavi* AIR 1955 T. C. 92. These cases also are distinguishable on facts. ILR 59 Mad. 461 : AIR 1936 Mad. 205 is no doubt a Full Bench decision, but that was a case in which sale was held after the death of the judgment-debtor without bringing judgment-debtor's heirs on record. The terms of the proclamation of sale were settled and sale was ordered while the judgment-debtor was alive and a party to the execution proceedings, but he died before the sale was actually held. At page 471 of the report, (ILR Mad.) = (at p. 206 of AIR), Cornish J. observes:--

"On the death of a judgment-debtor the decree cannot be executed against him, for there is no such thing as execution against a dead man. His property remains subject to the decree and to an attachment upon it, notwithstanding that it has passed to his heir or to a surviving coparcener or if there is an executor, has vested in his executor. But his death effects a change in the parties liable to execution. The legal representative has stepped into the place of the deceased judgment-debtor, with the liability under the decree, though his liability is limited to the extent of the deceased's assets which have come into his hands and have not been duly administered by him. In these well-known principles lies the reason for the provision in Section 50 enabling the decree-holder whose decree has not been fully satisfied prior to the death of the judgment-debtor to apply to the Court to execute the decree against the legal representative. They also explain the notice required by Order XXI, Rule 22.

"It is quite new to me",

Bald Cotton L. J. in *In re Shephard, Atkins v. Shephard* (1889) 43 Ch. D. 131,

"to hear it alleged that there is anything in the rules to enable the Court to make an order against a person who is not a party to the action. It is against all principle to proceed against him until he has been brought before the Court or all proper steps to bring him before the Court have been taken ineffectually." Those observations appear to me to be very pertinent to the case where the Court proceeds in execution of a decree made against A to sell property which on A's death has devolved on B without an opportunity to B of coming before the Court to show cause why execution should not proceed against him."

19. The learned Judge then refers to the conflict of judicial opinion on the question whether application u/s 50 and notice under Order 21. R. 22 CPC are the foundation of Court's jurisdiction. That was the main question considered by the Full Bench. The observations" quoted above indicate that the underlying principle is that there must be representation for the property to be proceeded against in execution proceedings. As pointed out above, once sale is validly held in execution proceedings, with regard to the property thus sold, there is no further execution to be ordered by the Court, hence the question of representation for the property already sold does not arise at the time of

confirmation of such a sale. The judgment-debtor or his legal representatives have the rights conferred by "Rules 89 and 90 of Order 21 Civil Procedure Code, but if these rights are not exercised by the judgment-debtor or his legal representatives, confirmation of sale must follow as a matter of course, unless the sale is set aside by the Court on an applications under R. 91 of Order 21, Civil Procedure Code. The ratio of the decision in ILR 59 Mad. 461 :AIR 1936 Mad. 205 seems to have been summarised in the following observations by Varadachariar J. at page 494 (of ILR Mad.) = (at p. 214 of AIR):--

"Again, it is not justifiable to assume that, once the proclamation of sale has been settled after notice to the judgment-debtor, everything necessary to safeguard his interests has been done. There are provisions in the Code which secure very considerable practical advantages to the judgment-debtor right down to the moment of sale and, under some of these, it is for him to take the initiative and not merely to oppose an application by the decree-holder, e.g., Order XXI. Rules 69 and 83; and, if the sale is to take place without any legal representative on record, these advantages will be denied to him."

20. As already pointed out above, after sale is validly held, it is for the judgment-debtor or his legal representatives to decide whether provisions of Rule 89 or 90 of Order 21 CPC should be availed of or not, and if they are not availed of and if the Court confirms the sale, the validity thereof will not be affected even though the legal representatives of the judgment-debtor, who died after the sale but before confirmation thereof, are not brought on record before confirmation of sale, as the jurisdiction of the Court is not affected thereby. The above Madras decision does not in our opinion help the defendant in this case; the point before Madras High Court was different.

21. In AIR 1955 T. C. 92 also the sale was held after the death of the judgment-debtor. That distinguishes the decision.

22. In our opinion, if the judgment-debtor's estate was properly represented at the date of the sale, even if the sale was confirmed after the judgment-debtor's death without bringing his legal representatives on record, such omission or failure to bring legal representatives on record does not affect the validity of the sale for reasons which we have indicated above.

23. The next question for consideration is whether the plaintiff's claim for possession of the entire suit property can be decreed. Mr. Pendse for the defendant contends that at best the auction-purchaser got the right, title and interest of only Hirachand, hence the plaintiff would not be entitled to the possession of the entire suit property. It was stated in the Courts below and also before us that the other judgment-debtor Ratanchand died without leaving any known heirs or legal representatives. It is urged that even if there are no heirs, Ratanchand's interest would pass on to the State and the plaintiff would not be entitled to possession of the property that belonged to Ratanchand. Ratanchand died before the auction-sale itself was held, hence it would be correct to say that

the auction-sale would not be binding on Ratanchand or his legal representatives. We are, however, required to find out whether decree for possession in respect of the entire suit property can be passed against the present defendant. The defendant in his written statement, Exhibit 10, nowhere states that he is not in possession of the entire suit property, nor does he state that Ratanchand has any interest in the suit property. If it is clear on the defendant's own written statement that he is in possession of the entire suit property and if his right, title and interest has passed on to the auction purchaser i.e. the present plaintiff, there is no reason why decree for possession of the entire suit property should not be passed in favour of the plaintiff. Ratanchand's legal representatives -- if any -- may, if they are so advised, dispute the plaintiff's right to possession, if they have a remedy available at law i.e., if it is within limitation. So also the State may, if it thinks proper, take the necessary steps, if it is correct to say that Ratanchand's property has escheated to the State. We are not concerned with those questions in this appeal.

24. For reasons indicated above, we confirm the decision of the lower appellate Court and dismiss the appeal with costs.

25. A copy of this judgment may be-sent to the State Government.

26. Appeal dismissed.