
(1946) 02 BOM CK 0009
In the Bombay High Court
Case No : Appeal from Order No. 59 of 1944

Nagindas Chhotalal

APPELLANT

Vs

Kunversha Hormusji

RESPONDENT

Date of Decision : 28-02-1946

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 21 Rule 92(3), 68, 90, 91

Citation : AIR 1947 Bom 181 : (1946) 48 BOMLR 812

Hon'ble Judges : Lokur, J

Bench : Single Bench

Judgement

Lokur, J.—This is an appeal against the order passed by the District Judge at Surut remanding Suit No. 109 of 1942 for retrial on certain issues framed by him. Plaintiff No. 1 and defendants Nos. 2 and 3 are the sons of Hormusji, plaintiff No. 2 is Hormusji's widow and plaintiff No. 3 is Hormusji's daughter. Defendant No. 1 obtained a decree against them on a mortgage and sought to recover the decretal amount by sale of the mortgaged property in Darkhast No. 437 of 1937 in execution of the decree, The plaintiffs and defendants Nos. 2 and 3 being agriculturists, the execution proceedings were transferred to the Collector for effecting the sale of the mortgaged property u/s 68 of the Civil Procedure Code. (In the course of those proceedings, the plaintiffs made an application that they were small holders as denned in the Bombay Small Holders Relief Act, 1938, and therefore the sale should be stayed u/s 3, Sub-section (1), of that Act. According to the plaintiffs, the sale was stayed for some time, but subsequently the property was sold by auction on April 30, 1941, and the sale was confirmed by the Collector on July 26, 1941. By that date the amount due under the mortgage decree to defendant No. 1 was Rs. 3,358-8-6 and the property was sold by auction for Rs. 3,425 and purchased by the decree-holder defendant No. 1 himself. The sale certificate was issued to him on February 10, 1942, and on March 31, 1942, the plaintiffs filed this suit to have the sale set aside on the ground of fraud by defendant No. 1 and the improper undervaluation of the property which had caused loss to them. The fraud is riot

specifically described in the plaint, but it is now alleged that the plaintiffs were held by the Collector to be small holders and although the sale was stayed for some time, defendant No. 1 fraudulently got the property put to auction and purchased it. The trial Court held that the suit was barred under Order XXI, Rule 9Q, Sub-rule (3), and dismissed it with costs. In appeal the learned District Judge held that the plaintiffs did not merely allege fraud or irregularity in publishing or conducting the sale within the meaning of Order XXI, Rule 90, of the Civil Procedure Code, but they contended that the Collector had no jurisdiction to hold the sale by reason of the Bombay Small Holders Belief Act, 1938, and that the plaintiffs could file a suit to challenge the validity of the sale on that ground. He therefore framed twelve issues, including those about fraud and irregularity in publishing or conducting the sale. I think the learned District Judge has gone beyond the reasons given by him for ordering the remand.

2. It is argued on behalf of the plaintiffs that Order XXI, Rule 92, Sub-rule (3), has no application when an auction sale is confirmed by the Collector, since the Collector, though he may be acting judicially, is not a Court and his order is not appealable. There is no substance in this contention. When execution, proceedings are transferred to the Collector u/s 68 of the Civil Procedure Code, the rules framed by Government, which are quoted in paragraph 96 of Chap. II of the High Court Civil Manual, Vol. I, p. 88, lay down the procedure to be followed by him. After the sale is held an application to set aside the sale under Order XXI, Rule 89 or 90 or 91, of the Civil Procedure, if any, is to be made to the Collector within the time limited by law and the Collector, after accepting the application and the deposit, if any, has to forward them to the civil Court and inform the applicant accordingly. The civil Court has then to decide that application and pass an order either setting aside the sale or refusing to set aside the sale. Those orders are appealable under Order XLIII, Rule 1, Sub-rule (1)(j), of the Civil Procedure Code. After receiving the order of the Court, the Collector confirms the sale if it is not set aside by the Court. That power is conferred upon the Collector by Rule 15(6) of the rules framed by Government. Then Order XXI, Rule 92(6), Sub-rule (3) says:-

No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

3. This does not say that the order referred to in that sub-rule must be an order of the Court. In fact the order setting aside or refusing to set aside the sale on an application made under Order XXI, Rule 89 or 91 or 98, is to be made by the Court, but the confirmation is to be made by the Collector. It is argued that if such an application is made, then the confirmation of the Collector may be final as no appeal is provided for it. But in the same way if any application is made and the Court confirms the sale, Order XLIII, Rule 1, does not provide any appeal against the order of confirmation. Order XLIII, Rule 1, sub-r, (i) (j), provides for an appeal against an order setting aside or refusing to set aside a sale and not against the order confirming the sale. Hence there is no force in the contention

that when the sale is confirmed by the Collector the judgment-debtor is left without a remedy if he is not allowed to file a suit. Hence if the sale is confirmed under Order XXI, Rule 92, Sub-rule (J), either by the Collector or by the Court, then Sub-rule (3) bars a suit to have the sale set aside on any of the grounds mentioned in Order XXI, Rule 89 or 90 or 91, of the Civil Procedure Code.

4. Some of the issues raised by the learned District Judge are, therefore, obviously not triable in a suit. He says that there was also a ground in the plaint that the order of the Collector was ultra vires because the plaintiffs alleged that they were small holders. Defendant No. 1 has stated definitely in his written statement that the Collector made an enquiry and "held on August 9, 1938, that the plaintiffs were not small holders and under Section 8 of the Bombay Small Holders Relief Act, 1938, that finding is final. Assuming that there was no such finding, still the Collector is not apparently debarred from selling the land of a small holder. The learned District Judge has framed an issue as to whether the Collector was bound to stay the execution proceedings by reason of the provisions of the Bombay Small Holders Relief Act, 1938, but Section 3, Sub-section (1), of the Act, itself has a proviso which empowers the Collector, for reasons to be recorded in writing, to refuse to stay the sale. Hence it cannot be said that the sale of the small holders' land held by the Collector is ultra vires. If he does not give reasons for not staying the sale even if he finds the plaintiffs to be small holders, it will only be an irregularity in the conduct of the sale. If the plaintiffs wanted to have the sale set aside on the ground of such an irregularity, the only course open to them was to make an application under Order XXII, Rule 90, of the Civil Procedure Code. But they failed to make such an application and allowed the sale to be confirmed by the Collector under Order XXI, Rule 92, Sub-rule (1). There is no ground set out in the plaint which is not covered by Order XXII, Rule 90, of the Civil Procedure Code, Hence the present, suit is barred under Order XXI, Rule 92, Sub-rule (3), of the Civil Procedure Code, and the learned District Judge was wrong in setting aside the dismissal of the suit and remanding it for further hearing.

5. Mr. Shah for the plaintiffs requests that if a suit is not maintainable, he should be allowed to convert the plaint into an application under Order XXI, Rule 90, of the Civil Procedure Code. Section 47, sub-s.(2), of the Code says:-

The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding and may, if necessary, order payment of any additional Court-fees.

6. An application for setting aside a sale under Order XXI, Rule 90, has to be made within thirty days after the sale takes place. The sale took place on April 30, 1941, and this suit was filed on March 31, 1942. In the plaint the plaintiffs alleged that they came to know of the sale only on January 15, 1942, but the trial Court has referred to various applications and has definitely found that at least on October 31, 1941, plaintiff No. 1 was aware that the sale had taken place on April 30, 1941, and he did not take any action within thirty days

thereafter. Even assuming that the plaintiffs came to know of the sale on January 15, 1942, they did not make an application under Order XXI, Rule 90, within thirty days thereafter. The present suit was filed after such an application was time-barred, and there is no reason to allow the plaintiffs to convert their plaint into such an application at this stage. No such request was made either in the trial Court or in the lower appellate Court.

7. For these reasons, I set aside the order of remand passed by the lower appellate Court and confirm the decree of the trial Court dismissing the plaintiffs' suit. The plaintiffs shall pay the costs of defendant No. 1 throughout and bear his own.