

(1966) 06 KL CK 0017

In the High Court Of Kerala

Case No : Second Appeal No. 147 of 1962

Narayana Pillai Krishna Pillai

APPELLANT

Vs

Damodaran Pillai Velayudhan Pillai

RESPONDENT

Date of Decision : 10-06-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 92(1)
Limitation Act, 1908 — Article 180

Citation : AIR 1967 Ker 159

Hon'ble Judges : T.S. Krishnamoorthy Iyer, J;S. Velu Pillai, J

Bench : Division Bench

Advocate : P.N. Rajan, for S. Easwara Iyer and L. Gopalakrishnan Potti, for the Appellant; G. Viswanatha Iyer, for the Respondent

Final Decision : Dismissed

Judgement

Krishnamoorthy Iyer, J.—This appeal by the 8th defendant raises the question of interpretation of the words "when the sale becomes absolute" occurring in the third column of Article 180 of the Indian Limitation Act (IX of 1908)

2. In execution of the decree, the decree-holder purchased decree schedule item 1 on 11-9-1953 and decree schedule items 4 and 5 on 26-9-1953. The court sale in respect of item 1 was confirmed on 11-10-1953. The 8th defendant filed a petition to set aside the court sale of items 1, 4 and 5 on 26-10-1953 under Order 21, Rule 90, C. P. C., which was dismissed for default on 19-1-1957 and the sale of items 4 and 5 was confirmed on the same date. The 8th defendant filed an application on 11-2-1957 to restore the petition to set aside the court sale which was dismissed for default and it was restored on 5-7-1957. The said petition was dismissed on 19-10-1958 on the merits. The auction purchaser filed the petition for getting delivery of items 1, 4 and 5 on 17-10-1960. The execution court rejected the petition for delivery on the ground that it was barred by limitation under Article 180 of the Indian Limitation Act while the appellate court held that the petition for delivery was not barred since it was filed within

three years of 19-10-1958, the date of the dismissal of the petition to set aside the court sale. The appellate court took the view that the sale of items 1, 4 and 5 became absolute only on 19-10-1958, though the orders confirming the court sales were passed earlier. The correctness of this view taken by the appellate Judge was canvassed before us.

3. Article 180 of the Indian Limitation Act, 1908, provides that an application for delivery of possession by a purchaser of immovable property at a sale in execution of a decree should be made within three years when the sale becomes absolute. Time under Article 180 runs from the date when the sale becomes absolute. Order 21, Rule 92 (1) of the CPC enacts:

"Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute

Provided.. . . . "

4. The submission on behalf of the appellant was that in the case before us the confirmation of the court sale of item 1 was on 11-10-1953 and of items 4 and 5 was on 19-1-1957 and therefore the sales became absolute on those dates and the petition for delivery filed beyond three years from those dates is barred by limitation.

5. In *Muthu Korakkai Chetty v. Madar Animal* ILR 43 Mad 185 :AIR 1920 Mad 1 after the confirmation of court sale on the 26th April, 1913, an application was made by the judgment-debtor on the 3rd January, 1914, to set aside the court sale on the ground of fraud and the court sale was set aside on the 25th June 1915, in respect of part of the properties sold. The auction purchaser having made an application on the 17th February, 1917, for delivery of the remaining properties, the question arose whether the application for delivery was barred by limitation under Article 180 of the Limitation Act, having been filed beyond three years from the date of the order confirming the court sale. It was held that the application was not barred under Article 180 of the Limitation Act as the time should be computed from the date of the order disposing of the petition to set aside the court sale and not from the date of the order confirming the court sale. Abdur Rahim, Officiating C. J. observed at p. 198 (of ILR Mad): (at p. 6 of AIR):

"The effect of entertainment of the application to set aside the sale after the order of confirmation must, having regard to the intention of the legislature as disclosed in this rule and quite apart from any general theory in such connections, be to render the order in effective so as to make the sale absolute. If we were to proceed upon an absolutely literal interpretation of the language of rule 92 without paying due regard to the intention of the legislature, this case would have to be treated as lying outside that rule, for it requires that the order of confirmation should be made after the disposal of any application to set aside the sale. If so treated, there would be no difficulty in the application of article 180. Whether it is the practice to issue a second certificate on the disposal of

such an application or not cannot, to my mind, affect the application of article 180; but I should suggest that a fresh certificate ought to be Issued, if not in all cases, at least in those cases where the sale is only partly upheld as the result of an application made to set it aside after the passing of the order confirming the sale.

Upon a proper interpretation, therefore, of Article 180 read with Rule 92 of Order XXI, Civil Procedure Code. I should hold that, where an application is made for delivery of possession of property sold in execution of a decree, the sale does not become absolute within the meaning of the third column of article 180 until the application made to set aside the sale under Rule 89 or 90 or 91 has been disallowed and the sale upheld, although an order confirming the sale had been passed before the application to set aside the sale was made."

6. In AIR 1934 134 (Privy Council) the application for delivery of possession was made beyond three years of the order dismissing the application to set aside the court sale and confirming the same but within three year of the order passed in appeal confirming the order refusing to set aside the court sale. In holding that the application for delivery though filed only within three years of the order passed by the appellate court was in time, their Lordships of the Judicial Committee observed:

"Upon consideration of the sections and orders of the Code, their Lordships are of opinion that in construing the meaning of the words "when the sale becomes absolute" in Article 180, Lim. Act, regard must be had not only to the provisions of Order 21, Rule 92 (1) of the Schedule to the CPC but also to the other material sections and orders of the Code, including those which relate to appeals from orders made under Order 21, Rule 92 (1). The result is that where there is an appeal from an order of the Subordinate Judge, disallowing the application to set aside the sale, the sale will not become absolute within the meaning of Article 180, Lim. Act, until the disposal of the appeal, even though the Subordinate Judge may have confirmed the sale, as he was bound to do, when he decided to disallow the above mentioned application."

7. The Supreme Court in Rama Krishna Rao v. Chellayamma AIR 1953 SC 426 following the decision of the Privy Council cited above held that where an appeal is filed against an order refusing to set aside the execution sale under Order 21, Rule 90, C. p. C., no finality can be attached to the order confirming the sale, until the appeal is decided. Fazi Ali. J. observed thus:

"In a simple case, the provisions cited above (Section 66 and Order 21, Rule 92, C. P. C.) should settle the controversy, but, in the present case, the matter has been complicated on account of the appeal against the order refusing to set aside, the sale under Order 21, Rule 90. In such a case, generally speaking, the true position seems to be that there is no finality until the litigation is finally determined by the appellate court.

This principle has been recognised in a number of cases, but it will be enough to

cite AIR 1934 134 (Privy Council) . The head note of that case runs as follows:

"Where a Subordinate Judge has disallowed an application under Order 21, Rule 90, to set aside a sale in execution, and has made an order under Rule 92 (1) confirming the sale, and an appeal from disallowance has been dismissed by the High Court, the three years period provided by the Indian Limitation Act, 1908, Schedule I, Article 180, for an application under Order 24, Rule 95, by the purchaser for delivery of possession runs from the date of the order on appeal; the High Court having under the Code of Civil Procedure, 1908, the same powers as the Subordinate Judge, the time when the sale becomes "absolute", for the purpose of Article 180 is when the High Court disposes of the appeal."

Under Article 180, Limitation Act, the period of limitation runs "from the date when the sale becomes absolute" If we give a narrow and literal meaning to these words, the period of limitation should be held to run from the date when the original court of execution confirms the sale. But, as was pointed out by the Privy Council, the High Court as an appellate court had the same powers as the trial court and it is only when the appeal was dismissed by the High Court that the order of the trial court confirming the sale became absolute. Till the decision of the appellate court, no finality attached to the order confirming the sale."

8. In view of the above decisions, there should be no difficulty in holding that the court sales in respect of items 1, 4 and 5 in fee case before us became absolute only on 19-10-1958 and the petition for delivery filed on 17-10-1960 is therefore within time.

9. But it was contended on behalf of the 8th defendant, that the application to set aside the sale was beyond thirty days from the date of sale of item 1 and whatever may be the position regarding items 4 and 5 the prayer for delivery of item 1 should be held to be barred. There is no substance in this contention of the learned advocate. In *Krishnadatta v. Sindhuram*. AIR 1950 Assam 89 the confirmation of the court sale was on 27-3-1944 and the judgment-debtor filed the petition to set aside the court sale under Sections 47 and 151, C. P. C. on 26-3-1945. The petition was dismissed on 4-10-1945. The order of dismissal was the subject-matter of appeal and revision in the High Court. The revision petition was dismissed by the High Court on 22-7-1947. The question arose whether the application for delivery on 3-5-1948 filed more than three years after the original order confirming the court sale on 27-3-1944 was in time. It was held that where the formal order of confirmation of an execution sale is challenged within three years by a petition under Sections 47 and 151, C. P. C. the order itself comes into question and the sale becomes absolute not on the date when the formal order of confirmation was passed but on the termination of the litigation commenced by the judgment-debtor for having the sale set aside. Their Lordships observed at p. 90:

"Where the formal order of confirmation is challenged by a petition under some provision of the CPC the order itself comes into question. If such a petition is

made within three years, the period within which an auction-purchaser must apply for possession under Rule 95, Civil P. C., the sale cannot be described as absolute during the period that the petition for setting aside the sale remains pending. The reasoning is equally applicable to applications under Rule 90 and application u/s 47 or 151. On principle, therefore, it is difficult to agree to a distinction between an application of the judgment-debtor for setting aside the sale under Order 21, Rule 90 on the one hand, and an application under other provisions of the Code, e.g. Sections 47 and 151, if they are made within three years from the date of the formal confirmation of the sale".

10. In this connection it will be useful to refer to the decision of the Privy Council in *Bajinath Sahai v. Ramgut Singh*. (1896) 23 FLR 775 construing the words "when the sale is confirmed, or would otherwise have become final and conclusive, had no such suit been brought" in Article 12 of the Limitation Act (1908). The facts in the case decided by the Privy Council were that a sale held by the Collector was confirmed by the Commissioner on 25-1-1884 and the suit to set aside the sale was filed only in July 1887." The period of limitation prescribed by Article 12 of the Limitation Act for such suit is one year. On 12-8-1884 the Board of Revenue had set aside the Commissioner's order but subsequently when they found that they had no jurisdiction to do so, restored the order of the Commissioner on 21-8-1886. The suit was filed within one year of the order dated 21-8-1886. It was held that there was no bar of limitation. Lord Davey observed:

"Their Lordships are of opinion that there was no final conclusive and definitive order confirming the sale, while the question whether the sale should be confirmed was in litigation, or until the order of the Commissioner of the 25th January 1884 became definitive and operative by the final judgment of the Board of Revenue on the 21st August 1886, or (in other words) that for the purpose of the law of limitation there was no final or definitive confirmation of the sale until that date."

11. The principle of the above decision also leads to the conclusion that a court sale does not become absolute on the passing of a mere order of confirmation enjoined by the provisions of Order 21, Rule 92 (1) of the C. P. C. but it acquires the attribute of finality or becomes absolute only on the termination of the proceedings started to set aside the court sale or to set aside the order confirming the same.

12. Even though the application to set aside the sale was filed after the order of confirmation of the sale of item 1, it was alleged that the judgment-debtor got knowledge of the sale of item 1 only on the date of the filing of the petition, as he was kept out of the knowledge of execution proceedings on account of the fraud of the decree-holder. Though the petition to set aside the sale was filed after the order of confirmation of court sale in respect of item 1, it was filed within three years of the order confirming the sale. The court sale of item I also therefore became absolute only on 19-10-1958, the date on which the petition to

set aside the court sale was dismissed on the merits. In this connection it is necessary to quote the observation of the Privy Council in *Bassu Kaur v. Dhum Singh* ILR (1889) All 47 wherein it was observed:

"It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not. And it would be a lamentable state of the law if it were found that a debtor who for years has been insisting that his creditor shall take payment in a particular mode, can when it is decided that he cannot enforce that mode, turn round and say that the lapse of time has relieved him from paying at all."

In this view, it has to be held that the second appeal is without any substance. It is therefore dismissed with costs.