(1975) 06 OHC CK 0012

In the Orissa High Court

Case No : Second Appeal No. 4 of 1972

Pitambar Pujari APPELLANT

Vs

Bhikari Mehera and Others RESPONDENT

Date of Decision : 05-06-1975

Acts Referred:

Chota Nagpur Encumbered Estates Act, 1876 — Section 12A
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 54, Order 21 Rule 64, Order 21 Rule 65, Order 21 Rule 72(2), Order 21 Rule 89
Orissa Land Reforms Act, 1960 — Section 22, 22(3)

Citation : (1975) 41 CLT 894

Hon'ble Judges : S. Acharya, J

Bench : Single Bench

Advocate : G. Rath and R.K. Rath, for the Appellant; R.C. Patnaik, for the Respondent

Final Decision : Dismissed

Judgement

S. Acharya, J.—The unsuccessful Plaintiff in both the Courts below has preferred this second appeal. The Plaintiff''s suit is for declaration of his tide over the suit land.

2. The admitted facts in this case are that Defendant No. 2 got a money decree against the Plaintiff and he levied execution of that decree as per Execution Case No. 239/67 in the Court of the Munsif, Patnagarh, to realise his decretal dues. In the said execution proceeding, the suit land belonging to the Plaintiff was attached and sold in auction sale on 15-4-1968, and Defendant No. 1, the son-in-law of Defendant No. 2, purchased the same. The said Court sale was confirmed on 20-6-1968 and no objection was filed against the aforesaid sale. Admittedly also the Plaintiff is a member of the scheduled tribe whereas Defendant No. 1. who purchased the said property in the aforesaid Court sale, is not a member of the scheduled tribe.

3. The Plaintiffs case is that as the aforesaid auction sale of the suit land is in

violation of the mandatory provisions of Section 22(3) of the Orissa Land Reforms Act, 1960 the said sale in favour of Defendant No. 1 is void invalid and inoperative and no title so the suit property passed in favour of Defendant No. 1 in the said auction sale. Mainly on the above averment the Plaintiff has filed this suit for declaration of his title to the suit property.

4. The Defendant''s case, infer alia, is that as the executing Court sold the suit property in auction sale in favour of Defendant No. 1 who was the highest bidder and that Court later confirmed the said sale to the knowledge of the Plaintiff, the provisions of Section 22(3) of the O.L.R. Act by implication have been complied with, and so the auction sale in favour of Defendant No. 1 cannot be said to be void and invalid, and accordingly by the said Court sale title in the suit land has validly passed to Defendant No. 1 and the Plaintiff is not entitled to the declaration prayed for by him.

5. Both the Courts have found that the Plaintiff is a member of the scheduled tribe and Defendant No. 1, the auction purchaser of the suit property, being a Bhulla by caste, is not a member of that tribe, no order as required u/s 22(3) of the O.L.R. Act was recorded by the executing Court while selling the suit property belonging the Plaintiff.

The trial Court further held that the auction sale was not rendered void because of non-mentioning by the executing Court of any specific direction as contemplated u/s 22(3) of the O.L.R. Act. It also held that the very fact that the sale was confirmed in favour of the auction purchaser and no objection was filed by the Plaintiff either under Rule 89 or Rule 90 of Order 21, CPC indicated that the provision of Sub-section (3) of Section 22 of the O.L.R. Act was complied with by implication and by conduct. Thus it held that in view of the above state of affairs it could not be held that the provision of Section 22(3) of the O.L.R. Act was not complied with and as such the Court sale could not be held to be illegal or void or without jurisdiction. It also held that the suit was hit by Rule 92(3) of Order 21, Code of Civil Procedure, and accordingly the same was not maintainable.

The appellate Court found that the Plaintiff never raised any objection before the executing Court to the effect that the said property could not be sold to Defendant No. 1 as the said property belonged to a member of the scheduled tribe; as the Plaintiff remained silent and allowed the property to be sold by auction sale in execution of the money decree he would not be allowed to agitate the said question at any later stage; as the said sale was made absolute in the presence and to the knowledge of the Plaintiff, the present suit is barred under Order 21, Rule 92(3), CPC Code, and so the suit was not maintainable.

6. Mr. Rath, the learned Counsel for the Appellant, urged that the transfer of the suit land in execution sale did not confer any right, title or interest on Defendant No. 1 as the suit lands belonged to a member of the scheduled tribe, and the executing Court before selling the property in that aforesaid execution

proceeding did not give any direction to the effect as contemplated u/s 1960 III O.L.R. 22 . Mr. Patnaik, the learned Counsel for the Respondents, urged that undisputedly the Plaintiff had knowledge of the execution proceeding; he knew that the suit lands were attached and were put for auction sale by the executing Court executing the money decree against him, and he did not raise any objection regarding the non-saleability of the suit land at any stage till the confirmation of the sale, so he would not be allowed to question the said sale 10 this subsequent suit. In support of Mr. Patnaik''s above contention he cited the Full Bench decision in Baijnath Prasad Sah Vs. Ramphal Sahni and Another, wherein the majority of the Judges constituting the Bench which decided that case held:

11. xx x xx xx

If a party has knowledge of a proceeding and having had an opportunity when it might and ought to have raised an objection it does not do so, it cannot be allowed to raise that objection subsequently, if the Court passes an order which it could not have passed in case that objection had succeeded on the ground that it must be deemed to have been raised by the party and decided against it. In other words, when an order is passed by a competent Court, which is inconsistent with the existence of fact or law on which the party could have based its objection, it must be deemed that the Court has decided those facts or law against it.

xx xx xx All objections to the executability of the decree have to be raised in such cases before the order for issue of attachment, the third stage is one when the Court orders sale of the judgment debtor''s property. Rule 64 of Order XXI provides that an executing Court may order the sale of any property attached by it, provided that property is liable to sale. As the Court has come to a decision at this stage that the property in question is liable to sale any objection on the ground of non-saleability of the property must be raised before that stage. If an objection relating to saleability is raised, the Court''s decision will be binding upon the parties. In case the judgment-debtor fails to raise any such question, the Court must be deemed to have decided it against him by passing an order for sale of the property because, unless it is liable to sale it cannot pass that order.

13. The next two stages are the sale and the confirmation of sale. If any circumstance comes into existence between the date on which the order for sale has been passed under Rule 54 and the date of actual sale and that circumstance makes the property non saleable, the Court cannot possibly proceed to sell the property, if it sustains an objection that subsequent to the order of sale, the property has, become non-saleable by reason of a prohibition contained in a statute or otherwise. The sale is the culmination towards which the execution proceeding moves. The order for sale of a property is passed only in order to enable the Court to sell it later. The order and the sale are thus connected together. The judgment-debtor must know after the order for sale that the Court would necessarily sell the property unless he raises an objection before sale, if

such an objection is available to him, that the property has become non-saleable after the order for sale. Having knowledge and opportunity, the judgment-debtor, who desires to objection to the sale of the property on such a ground, might and ought to raise it before the sale.

Under Rule 65 of Order XXI, a sale is conducted by an officer of the Court or by a person appointed for that purpose by the Court. The sale must nevertheless be considered to have been held by the Court. It acts judicially in accepting the bid and in passing an order for set off under Rule 72(2) where such an order is necessary. The Court''s order accepting the sale must operate as res judicata in subsequent proceedings because that order is inconsistent with the non-saleability of the property. In this connection I may refer to the Patna amendment of Rule 90 of Order XXI which lays down that:

no application to set aside a sale shall be admitted (a) upon any ground which could have been but was not put forward by the applicant before the sale was concluded....

Under Rule 92 of the same Order, the sale becomes absolute when it is confirmed by the Court. Once the sale becomes absolute, title to the property is deemed u/s 65 of the Code to have passed to the purchase on the date of sale. It is manifest that, whatever objection the judgment-debtor can take on the ground of the property having become non-saleable after the order of sale and before the date of sale, he must take it before the sale. If there is a ground which has become open to him to take after the sale and before the confirmation (If sale, he must take it at that stage. If he fails to take any objection in time, the Court must be deemed to have given its decision against that objection by accepting the sale or by passing an order of confirmation of the sale, as the case may be.

The above-mentioned majority decision in the said Full Bench case gets support from the decision on the point in Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others, and from the decision reported in Rajkishore Mohanty and Anr. v. Kangali Maharana and Ors. ILR 1972 Cutt 130, Respectfully I am in full agreement with the above view expressed In the Patna decision. In Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others, , it has been observed in paragraph 19 that the judgment-debtor neither at the time when the execution application was made and a notice was served on him nor at the stage when he moved for setting aside the two sales raised the objection that the executing Court had no jurisdiction to execute the decree, and so his failure to raise such an objection went to the root of the matter, and would preclude the judgment-debtor from raising the plea of jurisdiction, on the principle of constructive res judicata, after the property was sold to the auction-purchaser and he entered into possession of the same. Their Lordships held that the judgment-debtor, therefore, could not escape the effect of the order of sale of the property passed by the executing Court. Their Lordships in holding as above referred with approval to the decision in Amal Kumar''s case 38 Cal. W.N. 141, and Mahadeo Prasad Bhagat Vs. Bhagwat Narain Singh, . In the last mentioned Patna case a money decree was obtained on the footing of a loan and certain immovable property was sold in execution. On two occasions the judgment-debtor in his applications raised the question of the validity of the execution proceedings on the ground that the executing Court had no jurisdiction to sell the property in execution of a money decree as the sanction of the Commissioner as required u/s 12-A of the Chota Nagpur Encumbered Estates Act had not been obtained. The objection though mooted was not decided and the objection petitions were dismissed with the result that the sale was confirmed and the property came into possession of the auction purchaser. In an auction for a declaration that the sale of the said property was void for want of sanction of the Commissioner, it was held that even though the point was raised but as it was not decided in the objection petition u/s 47, the point was res judicata by reason of Explanation 4 to Section 11, Code of Civil Procedure. In A. Venkataseshayya v. A. Virayya AIR 1958 A.P. 1, one of the questions referred to the Full Bench by a Division Bench of the Andhra Pradesh

High Court is as follows:

1. Whatever when service inam lands have been sold in execution of a mortgage decree without any objection being raised at any stage of the proceedings to their saleability by reason of the prohibition contained in Section 5 of Madras Act III of 1895, it is open to the inamdar to treat the Court sale as null and void and recover possession of the lands from the purchaser at a Court sale or resist the claim of the purchaser to be put in possession of the lands?

The Full Bench, on a reference to large number of relevant decisions of different High Courts, held that if the defence which ought to be raised was not raised, the Court must be deemed to have decided against the contention not raised. In Andhra Pradesh attachment and sale of Carpenters Service Inam was absolutely prohibited by Madras Hereditary Village Officers Act, 1895, and so in a later suit it was contended that the sale confirmed by the executing Court in accordance with the decree in the previous suit was void and so the judgment-debtor could treat the Court sale as null and void though he had raised no objection at any early stage. In that case the question of invalidity of the mortgage and of the sale on the ground of public policy was not raised in the earlier suit or in the execution proceeding, and therefore it was held that the decree and the order confirming the sale in that case would operate as res judicata to the later case.

7. In the present case the Court which ordered the sale of the property in question and which confirmed the said sale had inherent jurisdiction to execute the decree. The execution of the decree and sale of the property in question in that execution proceeding were made on notice to and with the knowledge of the judgment-debtor, the Plaintiff of this case. After its sale to a non-scheduled tribe man and before confirmation of that sale the Plaintiff in the present case (the Judgment-debtor in that case) did not raise the objection that the sale of the property in favour of Defendant No. 1 was void as per Section 22 of the O.L.R. Act. If the Plaintiff would have raised that objection at that stage, the executing

Court would have considered that aspect of the matter, and as no such question was raised it would be deemed that question was constructively decided against the Plaintiff, and so the said decision would operate as res judicata in a subsequent suit. Section 22, O.L.R. Act does not totally prohibit Court sale of such properties in favour of persons not belonging to a scheduled tribe. Sub-section (3) thereof merely says that in case of such a sale the Court has to give a special direction to that effect. So, as the sale of the properties in question was confirmed by the Court to the knowledge of the Plaintiff in this case (the judgment-debtor in that execution proceeding) and he did not raise any objection to the confirmation of the said sale, it will be deemed that the Court decided against the Plaintiff''s present plea and gave the necessary direction required u/s 22(3) of the O.L.R. Act. Accordingly the sale made in the said execution proceeding would be binding on the Plaintiff in the present suit.

8. On the position of the law discussed above Mr. Rath''s above-mentioned contention on behalf of the Appellant would not stand. The decision reported in Ram Chandra Arya Vs. Man Singh and Another, , cited by Mr. Rath, is not applicable to the present case. In that case before the Supreme Court a decree had been passed against a lunatic without appointment of a guardian and hence the decree was ab initio void and being a nullity had to be treated as non est and consequently the sale held in execution of such a void decree was certainly ab initio void. In such a case, there is no question of any party having resort to the provisions of Rules 89 or 90 of Order 21, CPC Code. In the present case before me the legality of the decree which was executed in the execution proceeding is not challenged. The judgment-debtor in the said execution case (the Plaintiff in the present suit) did not, as stated above, raise any objection against the saleability of the property in question on any ground whatsoever and the sale in favour of Defendant No. 1 was confirmed. The beneficial provisions for the protection of the interest of the judgment-debtor as provided in the CPC under Order 21 Rules 89 and 90 were not resorted to by the judgment-debtor. The Court therefore had no choice but to confirm the said sale. So the law discussed in the preceding paragraphs sqarely applies to the facts of this case and the decision in Ram Chandra Arya Vs. Man Singh and Another, cited by Mr. Rath, is of no avail. In the said decision itself it has been stated that the case of a sale of properties in execution without any objection of the judgment-debtors as in the present case is different from the case of a sale held in the execution of a decree which is ab initio void and a nullity in law, as in the Supreme Court case. So I am of the opinion that the said Supreme Court decision is of no application to a case of the present nature.

9. On the above discussions and considerations, I am of the view that the Plaintiff''s suit is hit by the principles of res judicata and has been rightly dismissed by the Courts below.

10. There is no merit in the Second Appeal and it is accordingly dismissed, but on the facts and circumstances of the case, there will be no order as to costs of

this appeal.

