
(1949) 09 OHC CK 0007
In the Orissa High Court
Case No : Civil Revision No. 131 of 1918

Ramanath Panda

APPELLANT

Vs

Damodar Sahu and Others

RESPONDENT

Date of Decision : 08-09-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 83, Order 21 Rule 83(1), Order 21 Rule 83(2), 115, 73

Citation : AIR 1950 Ori 230

Hon'ble Judges : Ray, C.J.; Jagannadhadas, J

Bench : Division Bench

Advocate : B. Mohapatra, for the Appellant; P.V.B. Rao, for the Respondent

Final Decision : Allowed

Judgement

Jagannadhadas, J.—The facts giving rise to this revision may be briefly stated as follows:

2. Original Suit no. 23 of 1943 on the file of the Subordinate Judge, Berhampur, was a partition suit between the members of a joint family owning extensive properties in which were included the Aska Sugar Works and Distillery also the Saw Mills at Russelkonda. One of the parties in the suit was appointed as the receiver of the family properties in the partition suit. A number of creditors of the family had obtained decrees against them and at the relevant date, there were as many as 12 decrees obtained by the creditors against the members of the family and pending execution.

3. The petitioner before us is one of them having obtained a decree in O. S. No. 45 of 1939. He applied for execution in E. P. No. 301/45. The rest of the 12 decree-holders had also taken steps in execution. Eight of them had attached the Mill at Busselkonda and four of them including the present petitioner had attached the Sugar Works and Distillery at Aska. When these various executions and attachments were pending there was a proposal to sell the sugar factory and

the saw mill by private sale for a sum of about Rs. 6 lakhs. In order to assure the intending purchaser that the purchase will be free from the claims of decree, holders under their attachments, the receiver appears to have applied for certificates in the various decrees which were then under execution, for permission to sell the attached properties by private sale under Order 21, Rule 83, Civil P. C., and the requisite permission and certificates were accordingly granted.

4. The two items of properties, that is the sugar factory and the saw mill appear to have been sold and out of the purchase-money of six lakhs, two lakhs have been deposited in the Court by the purchaser. Meanwhile, it would appear that one Bhabani Saukar Sen, who had brought a suit against the members of the judgment, debtors' family in the original side of the Calcutta High Court, filed an application to implead the receiver as a party in his suit and appears also to have obtained an order that the sale-proceeds of the Aska sugar factory and the distillery were not to be distributed to any of the creditors until further orders of the Court. It is now stated to us that that order has been finally vacated and if that be so, it would appear that none of the parties will ultimately have a grievance by the order now sought to be revised, because there appears to be enough money in Court to satisfy all. But as the parties are not quite clear whether the vacating of that order completely safeguards that right, we have been invited to go into the question raised in this revision petition and it is accordingly necessary to do so. In the total sale price of six lakhs, two lakhs was for the saw mill and four lakhs for the sugar factory. Accordingly out of the two lakhs of the sale-price deposited into the Court the learned Judge treated 1/3rd thereof as being available towards the sale-price of the saw mill and the balance 2/3rds towards that of the Aska Sugar Factory and Distillery. This 2/3rds could not be distributed by virtue of the order of the High Court staying his hands in respect of the distribution regarding the sale-proceeds of the Aaka Sugar Factory as already stated. As regards the 1/3rd of two laks available in respect of the Russelkonda saw mill, he has made an order distributing that amount as between the eight decree, holders who have made attachments of the saw mill. The petitioner, who did not attach the saw mill but attached only the sugar factory claimed before the Subordinate Judge that he was also entitled to rateable distribution along with others out of that amount. But the learned Subordinate Judge has overruled his contention treating the 1/3rd amount of two lakhs as funds ear-marked for distribution only as between such of the decree-holders who had attached the saw mill. It is this order that is now sought to be revised, by the decree-holder who had obtained his decree in O.S. No. 45 of 1939 and who has admittedly made his application to the Court for execution before the sale-proceeds came into the hands of the Court.

5. On behalf of the respondents, an objection is taken to the maintainability of this revision and it is contended that if the order of the learned Subordinate Judge was wrong, it was only a mistake of law and that in any case, the petitioner had another remedy by suit and that therefore this revision ought not

to be entertained. It will appear, however, from what follows in this judgment that what the learned Subordinate Judge has done is not a mere mistake of law as to the construction of any particular legal provision: but what he has said is that this is not a case which falls u/s 73, Civil P. C. and if he is wrong in that view, he has denied to himself the jurisdiction which he had of making a proper rateable distribution of the assets and has denied to the petitioner a remedy which he was entitled to get, on a mistaken view of his powers in this behalf. Such a mistake is not a mere mistake of law, but a mistake as to jurisdiction based on an erroneous view of the law. The objection, therefore, as to the maintainability of this revision cannot be sustained.

6. On the above statement of facts, prima facie, the petitioner would be entitled to a rateable distribution u/s 73, Civil P. C. Admittedly, the assets of the judgment-debtors to the extent of 1/3rd of the two lakhs are in the hands of the Court and are available for distribution. Admittedly also, the petitioner has made an application for execution to the Court which had these assets in its control before they were received. Under this section, therefore, this decree-holder along with others in a similar situation was entitled to get part satisfaction of his decree by rateable distribution. The learned Judge, however, relies on certain other facts which he notices in his judgment as disentitling the petitioner from getting rateable distribution out of this amount. He notices that when the permission for private sale under Order 21, Rule 83, Civil P. C. was given, it was with the consent of the respective attaching decree-holders, that is to say, the permission to sell the saw mill was given with the consent of the decree-holders who had attached the saw mill by then and the permission to sell the Aska Sugar Factory and distillery was given with the consent of the decree-holders who had attached the sugar factory by then including the present petitioner. He, therefore, thinks that the moneys realised by the respective sales of the saw mills and the sugar factory are moneys ear-marked for distribution to those particular decree-holders who had given the consent and who have thereby facilitated the private sale of these items of property. Apart from the legal aspect of the matter, it may be pointed out that the learned Subordinate Judge has not been consistent in this view, because by his order he has allowed rateable distribution to two other attaching decree-holders who have attached the saw mill subsequent to the order granting permission for private sale as will be found from the closing part of his judgment wherein he says that the creditors in E. P. 218/47 and E. P. 249/47 who had not attached by the date of the permission for private sale would also be entitled to rateable distribution. In addition to the above facts he also relies upon an order dated 6th November 1947 which is order No. 379, wherein the Court appears to have observed that the attaching creditors of the saw mill shall be paid out of the sale-proceeds of the saw mill after the disposal of the application of Sri Bhanani Sinkar Sen and attaching creditors of the sugar factory shall be paid out of the sale-proceeds of the sugar factory.

7. The question for consideration is whether the learned Judge is right in his view that whether the fact of the permission for private sale having been granted on

the consent of the respective attaching decree-holders to waive their objection thereto, or the fact of a prior order having been made by the Court stating that the attaching creditors of the sugar factory shall be paid out of the sale-proceeds of the sugar factory and the attaching creditors of the saw mill shall be paid out of the sale-proceeds of the saw mill, will in any way affect the statutory right that the petitioner has u/s 73 to get a rateable distribution out of the assets of the judgment debtors that were in the hands of the Court. If it was made out to the satisfaction of the Court that these prior orders on which the learned Subordinate Judge relies were orders passed with the consent of all the parties affected including this petitioner, the position may conceivably be different and it might not have been open to the petitioner to claim his statutory right u/s 73 having waived the same previously. The learned Judge does not base his order on any such ground and we have been shown no material for thinking that these prior orders were based on the consent also of this petitioner. The question therefore is whether apart from any such consent the Court had the right to ear-mark funds available as a result of private sales under Order 21, Rule 88 as liable to distribution only among particular creditors. It appears to us that such a view is clearly untenable in the face of the specific provision of Order 21, Rule 83. It is to be noticed that the power of the Court to grant permission for private sale is not based on any consent to be given by any of the parties. It is a discretion fully vested in the Court, Consent might facilitate the passing of the order, but the order itself is based on the discretionary power of the Court. By Order 2, Rule 83, Sub-section (2) and proviso thereunder "All moneys payable under the private sale excepting in so far as the decree-holder may be entitled to set off must be paid into the Court." This is mandatory and once it is paid into the Court, the sale proceeds become in terms of Section 73, assets held by the Court: and they are none-the-less so because the amounts have not been realised by a process of compulsory sale. They are moneys which have been realised in the course of the execution which was pending at the time. It is obviously the policy of law that all such moneys, by whatever course realised once they come into the Court are to be treated as assets available for distribution amongst all the decree-holders of the judgment-debtor who have been vigilant enough to have applied to the Court for execution by that time. It therefore follows that neither the consent of the attaching decree-holders nor the discretion of the Court can have any bearing on the matter and it must be held that the Court would have no discretion to ear-mark such sale proceeds for payment to individual creditors. Learned counsel for the respondent relies on certain decisions, but it is unnecessary to notice them at length. The relevant questions have been discussed fully in various cases and it is now the generally accepted view that where moneys belonging to the judgment-debtor have come into the Court, either by regular process of execution or under Order 21, Rule 55, or Order 21, Rule 83, or Order 21, Rule 89, they are assets held by the Court available for rateable distribution. The contrary view which has been accepted in *Sordbji Cootcarji v. Kala Raghunath* 36 Bom. 166: 121. C. 911 and other cases in that line are no longer accepted as good law. It is enough to refer to the cases in *Thireviyam Pillai v. Lakshmana*

Pillai 41 Mad. 616 : A. I. R.1919 Mad. 647 Satnarain Prasad Choudhury and Others Vs. Mahabir Prasad Choudhury and Others, : Pt. Sidh Nath Tewari Vs. Tej Bahadur Singh and Others Noor Mahomed v. Bilasiram 47 Cal. 515 : A. I. R.1920 Cal. 185 and Chittagong Urbin Co-operative Bank Ltd. v. Indo-Burmah Traders Bank Ltd. A. I. R. 1933 Cal. 521 : 176 I. C. 607 to substantiate the above view.

8. The order of the learned Subordinate Judge is therefore unsustainable and it is hereby set aside. The revision is accordingly allowed with costs.

9. Hearing fee is assessed at one gold mohur.

Ray, C.J.

10. I agree.